United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

NO. 76-7143

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALBERT BRICK,

Plaintiff-Appellant,

v.

CPC INTERNATIONAL, INC.,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
MAY 24 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALBERT GRICK PLAINTIFF	)	
vs.	)	CIVIL ACTION NO. 1503-73
CPC INTERNATIONAL, INC. DEFENDANT	)	

AMENDED COMPLAINT - CLASS ACTION FOR DAMAGES

1. PLAINTIFF BRINGS THIS CLASS ACTION ON BEHALF OF HIMSELF AND HIS CLASS CONSISTING OF ALL OF THE SHAREHOLDERS OF FUNK SEEDS INTERNATIONAL, INC. JURISDICTION VESTS UNDER SECTION 10(B) OF THE SECURITIES AND EXCHANGE ACT OF 1934, 15 U.S.C.A. 78(J) AND RULE 10(B)5 PROMULGAYED THEREUNDER, 17 CFR 240.10 (B)5; SECTION 20 OF THE ACT, 15 U.S.C.A. 78(T); SECTION 27 OF THE ACT, 15 U.S.C. A. 78AA; SECTION 28 OF THE ACT, 15 U.S.C.A. 78BB(A), AS WELL AS THE GENERAL JURISDICTION OF THIS COURT OVER ACTIONS IN EXCESS OF $50,000.00 BROUGHT IN THE DISTRICT OF COLUMBIA AS OF THE TIME OF THE FILING OF THIS ACTION.

2. PLAINTIFF ALLEGES THAT THE DEFENDANT WAS PREVIOUSLY THE SOLE OWNER OF THE STOCK OF FUNK SEEDS INTERNATIONAL, INC. THAT THEREAFTER, IN THE SUMMER OF 1972, DEFENDANT MADE A PUBLIC OFFERING OF THE STOCK IN SAID FUNK SEEDS INTERNATIONAL, INC. THAT SUCH OFFERING RESULTED IN A SALE OF APPROXIMATELY 75% OF THE SHARES OF STOCK IN SAID CORPORATION AT A PRICE OF APPROXIMATELY $24.00 PER SHARE WHICH BENEFITTED THE DEFENDANT TO THE EXTENT OF APPROXIMATELY $60,000,000.00 BEFORE TAXES. THAT AT THE TIME OF SUCH PUBLIC OFFERING AND PRIOR THERETO, DEFENDANT WAS AWARE THAT CERTAIN FRANCHISING COMPANIES WHO HAD CONTRACTS WITH AND DEALT WITH FUNK SEEDS INTERNATIONAL HAD INDICATED A DESIRE TO TERMINATE THEIR FRANCHISE AGREEMENTS AND ARRANGEMENTS WITH FUNK SEEDS; THAT AS A RESULT OF VARIOUS CONTRACTS DISPUTES BETWEEN THE SAID PARTIES, THERE WAS AN IMMINENT PROSPECT OF EXTENSIVE AND MULTIPLE LITIGATION WITH WHICH THE SAID FUNK SEEDS INTERNATIONAL, INC., WOULD BECOME INVOLVED. THAT SAID DEFENDANT FURTHER KNEW OR SHOULD HAVE KNOWN THAT UPON THE TERMINATION OF SUCH FRANCHISES, FUNK SEEDS WOULD BE SERIOUSLY AFFECTED BY HEAVY EXPENSES RESULTING IN THE TAKE-OVER FROM THE FRANCHISE COMPANIES, THAT FUNK SEEDS WOULD LOSE GREAT SUMS OF MONEY FROM TAKING OVER CERTAIN INVENTORIES FROM SAID FRANCHISES; THAT FURTHERMORE, FUNK SEEDS MIGHT VERY WELL BE LEGALLY OBLIGATED TO PURCHASE ITS INVENTORY FROM SUCH ASSOCIATES IF EITHER PARTY TERMINATED THEIR CONTRACT. THAT ALL OF THE

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FORECLOSING RESULT FROM THE INADEQUATE [illegible] OF FRANCHISE AGREEMENTS WERE [illegible] BY THE DEFENDANT IN HIS PROSPECTUS ISSUED AT THE TIME OF THE ABOVE DESCRIBED PUBLIC OFFERING. THAT SUCH NON-DISCLOSURE OF ESSENTIAL AND MATERIAL INFORMATION IN SAID PROSPECTUS CONSTITUTED A VIOLATION OF THE SECURITIES EXCHANGE ACTS OF THE UNITED STATES AND CONSTITUTED ILLEGAL AND FRAUDULENT ACTS UNDER SUCH LAWS.

3. THAT IN ADDITION TO THE FOREGOING, AND PRIOR TO THE PUBLIC OFFERING OF THE STOCK OF FUNK SEEDS INTERNATIONAL, INC., THE DEFENDANT AS SOLE STOCKHOLDER OF FUNK SEEDS HAD A SPECIAL DIVIDEND DECLARED IN THE APPROXIMATE AMOUNT OF $1[illegible],000,000.00. THAT SUCH DIVIDEND WAS NOT DECLARED OUT OF NET EARNINGS OR PROFITS PURSUANT TO THE LAWS OF THE STATE OF DELAWARE IN WHICH FUNK SEEDS INTERNATIONAL, INC., WAS INCORPORATED, BUT INSTEAD WAS FINANCED BY A LOAN MADE BY THE SAID FUNK SEEDS. THAT SUCH TRANSACTION WAS ILLEGAL AND FRAUDULENT AND IMPROPERLY ENCUMBERED FUNK SEEDS INTERNATIONAL, INC., WITH A $1[illegible],000,000.00 INDEBTEDNESS WHICH THE DEFENDANT KNEW, OR SHOULD HAVE KNOWN, WAS ILLEGAL AND INVALID.

4. THAT ALL OF THE STOCKHOLDERS OF FUNK SEEDS INTERNATIONAL, INC., HAVE BEEN DAMAGED AS A RESULT OF THE ABOVE DESCRIBED FRAUDULENT AND ILLEGAL ACTS OF THE DEFENDANT IN THE PURCHASE OF STOCK AT HIGHLY INFLATED PRICES AND IN THE EVENTUAL DIMINUTION OF THE VALUE OF THEIR HOLDINGS.

CLASS ACTION

5. THE FOREGOING COMPLAINT CONSTITUTES A CLASS ACTION PURSUANT TO RULE 23(a); 23(b)(1)(B); AND 23(b)(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

6. THE SIZE AND NUMBERS OF THE CLASS ARE UNKNOWN TO THE PLAINTIFF WHO HAS BEEN PROHIBITED BY THIS COURT FROM CONTACTING ANY OF THE OTHER MEMBERS OF THE CLASS. THEY CONSIST OF ALL OF THE STOCKHOLDERS OF FUNK SEEDS INTERNATIONAL, INC.

7. PLAINTIFF ALLEGES THAT HE IS THE PURCHASER OF 600 SHARES OF THE COMMON STOCK OF FUNK SEEDS INTERNATIONAL, INC. THAT AS A STOCKHOLDER OF SUCH A SUBSTANTIAL AMOUNT OF STOCK, HE CONSTITUTES A FIT AND PROPER PERSON WHO WILL FAIRLY AND ADEQUATELY REPRESENT HIS CLASS.

8. THAT THE QUESTIONS OF FACT AND LAW INVOLVING THE PROPRIETY AND LEGALITY OF THE ACTIONS OF THE DEFENDANT AS SET FORTH ABOVE, AS WELL AS THE

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DAMAGE ATTRIBUTABLE THERETO RESULTING TO THE SHAREHOLDERS OF FUNK SEEDS INTERNATIONAL, INC., OF COMMON QUESTIONS OF LAW AND FACT APPLICABLE TO ALL MEMBERS OF THE CLASS.

9. THAT IN VIEW OF THE FOREGOING, A CLASS ACTION IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY AND THAT IF INDIVIDUAL SUITS WERE BROUGHT BY INDIVIDUAL STOCKHOLDERS, THE RULINGS IN SUCH CASES COULD VERY WELL BE MUTUALLY DEFEATING AND DETRIMENTAL TO THE INTERESTS OF ALL OTHER STOCKHOLDERS UNLESS THE ACTIONS WERE BROUGHT AS A CLASS ACTION.

FIRST COUNT

10. PLAINTIFF ADOPTS AND INCORPORATES HEREIN BY REFERENCE ALL OF THE ALLEGATIONS SET FORTH IN PARAGRAPHS 1 THROUGH 9 ABOVE. PLAINTIFF ASSERTS THAT THE ACTIONS OF THE DEFENDANT AS SET FORTH ABOVE CONSTITUTE ILLEGAL AND FRAUDULENT ACTS UNDER THE SECURITIES EXCHANGE ACTS OF THE UNITED STATES, DAMAGING TO THE PLAINTIFF AND PLAINTIFF'S CLASS.

WHEREFORE PLAINTIFF DEMANDS JUDGMENT AGAINST THE DEFENDANT IN THE SUM OF $75,000.00 COMPENSATORY DAMAGES, PLUS COURT COSTS AND ATTORNEY'S FEES, AND FURTHER DEMANDS ADDITIONAL JUDGMENT IN THE SUM OF $100,000,000.00 FOR PUNITIVE DAMAGES, PLUS COURT COSTS AND ATTORNEY'S FEES.

SECOND COUNT

11. PLAINTIFF ADOPTS AND INCORPORATES HEREIN ALL OF THE ALLEGATIONS SET FORTH IN PARAGRAPHS 1 THROUGH 9 ABOVE. PLAINTIFF ALLEGES THAT AS A RESULT OF THE FOREGOING ACTS AND CONDUCT OF THE DEFENDANT, SAID DEFENDANT IS LIABLE TO THE PLAINTIFF AND PLAINTIFF'S CLASS BASED UPON THE COMMON LAW RIGHT OF FRAUD AND DECEIT.

WHEREFORE PLAINTIFF DEMANDS JUDGMENT AGAINST THE DEFENDANT IN THE SUM OF $75,000.00 COMPENSATORY DAMAGES, PLUS COURT COSTS AND ATTORNEY'S FEES, AND FURTHER DEMANDS ADDITIONAL JUDGMENT IN THE SUM OF $100,000,000.00 FOR PUNITIVE DAMAGES, PLUS COURT COSTS AND ATTORNEY'S FEES.

THIRD COUNT

12. PLAINTIFF ADOPTS AND INCORPORATES HEREIN BY REFERENCE THE ALLEGATIONS SET FORTH IN PARAGRAPHS 1 THROUGH 9 ABOVE. PLAINTIFF ALLEGES THAT THE FOREGOING

ACTS OF THE DEFENDANT ALLOW PLAINTIFF TO BRING AN ACTION AGAINST SAID DEFENDANT BASED UPON THE COMMON LAW CAUSE OF ACTION FOR NEGLIGENCE, DISREGARD BY THE DEFENDANT OF THE RIGHTS OF OTHERS, AS SET FORTH ABOVE.

WHEREFORE PLAINTIFF DEMANDS JUDGMENT AGAINST THE DEFENDANT IN THE SUM OF $75,000.000, PLUS COURT COSTS AND ATTORNEY'S FEES.

Samuel Intrater

SAMUEL INTRATER
ATTORNEY FOR PLAINTIFF
1025 VERMONT AVENUE, N. W.
WASHINGTON, D. C. 20005
347-6953

DISTRICT OF COLUMBIA, ss:

ALBERT BRICK, HAVING FIRST BEEN DULY SWORN UPON OATH, DEPOSES AND STATES AS FOLLOWS: THAT HE IS THE PLAINTIFF IN THE ABOVE ENTITLED CAUSE; THAT HE HAS READ THE AMENDED COMPLAINT FILED HEREIN ON HIS BEHALF; THAT THE FACTS SET FORTH IN SAID COMPLAINT ARE TRUE TO HIS BEST KNOWLEDGE, INFORMATION AND BELIEF.

ALBERT BRICK

SUBSCRIBED AND SWORN TO BEFORE ME THIS ____ DAY OF MAY, 1974.

NOTARY PUBLIC

COPY OF THE FOREGOING AMENDED COMPLAINT MAILED THIS ____ DAY OF MAY, 1974, TO CANNON, GORDON AND REINDEL, ATTORNEYS FOR DEFENDANT, SUITE 700 FEDERAL BAR BUILDING WEST, 1819 H STREET, N. W., WASHINGTON, D. C. 20006.

Samuel Intrater

SAMUEL INTRATER

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA, CIVIL DIVISION

- -x

ALBERT BRICK, :

Plaintiff, :

-against- :

CPC INTERNATIONAL INC., : Civil Action No. 1503-73

: Richey, J.

Defendant. :

- -x

ANSWER TO AMENDED COMPLAINT

Defendant, CPC International Inc. ("CPC"), by its attorneys, Cahill Gordon & Reindel, for its answer to the amended complaint herein:

1. With respect to the allegations of paragraph 1 of the amended complaint, admits that plaintiff purports to bring this action as a class action and to invoke the jurisdiction of this Court in the manner alleged, but denies that any basis for such class action status or jurisdiction exists and avers that plaintiff has not satisfied (and, upon information and belief, cannot satisfy) the prerequisites of Rule 23 of the Federal Rules of Civil Procedure.

2. With respect to the allegations of paragraph 2 of the amended complaint, admits that from June 30, 1967 to August 29, 1972, CPC was the sole owner of the common stock of Funk Seeds International, Inc. ("Funk"), that commencing on August 29, 1972, there was a public offering by CPC and Funk

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of approximately 75% of Funk's common stock, and that subsequent thereto (without any prior knowledge, expectation, forewarning or reasonable basis for the anticipation thereof on the part of CPC) certain associate companies of Funk terminated their franchise agreements with Funk. Except as so admitted, CPC denies the allegations of said paragraph and denies that it engaged in any wrongdoing or impropriety in connection with any of the foregoing.

3. With respect to the allegations of paragraph 3 of the amended complaint, admits that prior to the public offering and while Funk was a wholly-owned subsidiary of CPC, Funk declared a special dividend of $13,500,000 (as to which full and proper disclosure was made); refers to the prospectus disseminated in connection with said public offering for a true and accurate description of the manner in which and method by which said dividend was declared; denies that CPC engaged in any impropriety or wrongdoing in connection with the foregoing, and denies the remaining allegations of said paragraph.

4. Denies the allegations of paragraph 4 of the amended complaint.

WITH RESPECT TO THE CLASS ACTION ALLEGATIONS

5. Denies the allegations of paragraph 5 of the amended complaint.

6. With respect to the allegations in paragraph 6 of the amended complaint, admits that plaintiff and his law partner have been enjoined by this Court from contacting other

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present or former stockholders of Funk and refers to the order of this Court filed on April 29, 1974 for the terms thereof; admits that the putative class is purported to consist of "all of the stockholders of [Funk]", but denies knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph.

7. With respect to the allegations of paragraph 7 of the amended complaint, admits, upon information and belief, that plaintiff purchased 600 shares of Funk's common stock in February 1972, but denies that plaintiff is or can be a fit or proper class representative or that he can or will fairly and adequately represent the putative class.

8. Denies the allegations of paragraph 8 of the amended complaint.

9. Denies the allegations of paragraph 9 of the amended complaint.

WITH RESPECT TO THE FIRST COUNT

10. Denies the allegations of paragraph 10 of the amended complaint and repeats and realleges each and every admission, denial, reference and averment contained in paragraphs 1 through 4 hereof with the same force and effect as if fully set forth herein.

WITH RESPECT TO THE SECOND COUNT

11. Denies the allegations of paragraph 11 of the amended complaint and repeats and realleges each and every admission, denial, reference and averment contained in paragraphs

1 through 4 hereof with the same force and effect as if fully set forth herein.

WITH RESPECT TO THE THIRD COUNT

12. Denies the allegations of paragraph 12 of the amended complaint and repeats and realleges each and every admission, denial, reference and averment contained in paragraphs 1 through 4 hereof with the same force and effect as if fully set forth herein.

FIRST AFFIRMATIVE DEFENSE

13. The amended complaint fails to set forth a claim upon which the relief sought can be granted.

SECOND AFFIRMATIVE DEFENSE

14. Plaintiff has not satisfied (and, upon information and belief, cannot satisfy) the prerequisites of Rule 23 of the Federal Rules of Civil Procedure, and no basis exists for the prosecution of this action as a class action.

THIRD AFFIRMATIVE DEFENSE

15. Plaintiff, having purportedly purchased his shares of Funk common stock on February 14, 1973, is, by virtue of the events which had occurred and the public information known and/or available to him as of that date, barred and estopped from asserting the claims set forth in the amended complaint.

WHEREFORE, defendant CPC International Inc. demands judgment dismissing the amended complaint herein, together with

the costs, including reasonable attorneys fees, and disbursements of this action, and such other and further relief as the Court may deem just and proper.

Dated: June 13, 1974

CAHILL GORDON & REINDEL

By _____
A Member of the Firm
Attorneys for Defendant
CPC International Inc.
1819 H Street, N.W.
Washington, D. C. 20005
202-223-3350

TO:

Samuel Intrater, Esq.
Brick & Intrater
1025 Vermont Avenue, N.W.
Washington, D. C. 20005

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Answer to Amended Complaint by causing a copy thereof to be hand delivered to:

Samuel Intrater, Esq.
Brick & Intrater
1025 Vermont Avenue, N.W.
Washington, D. C. 20005

Laurence T. Sorkin

Dated: June 13, 1974

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALBERT GRICK	)	
PLAINTIFF	)	
vs.	)	CIVIL ACTION NO. 1503-73
CPC INTERNATIONAL INC.	)	
DEFENDANT	)	

MOTION FOR CERTIFICATION

COMES NOW THE PLAINTIFF, BY AND THROUGH HIS ATTORNEY, AND MOVES THIS HONORABLE COURT FOR CERTIFICATION THAT THE ABOVE ENTITLED CAUSE MAY BE MAINTAINED AS A CLASS ACTION. IN SUPPORT OF SAID MOTION, PLAINTIFF REFERS THIS HONORABLE COURT TO THE ALLEGATIONS SET FORTH IN THE AMENDED COMPLAINT FILED HEREIN.

SAMUEL INTRATER
ATTORNEY FOR PLAINTIFF
1025 VERMONT AVENUE, N. W.
WASHINGTON, D. C. 20005
347-6953

COPY OF THE FOREGOING MOTION MAILED THIS 21ST DAY OF JUNE, 1974, TO CAHILL, GORDON AND REINDEL, ATTORNEYS FOR DEFENDANT, SUITE 900 FEDERAL BAR BUILDING WEST, 1819 H STREET, N. W., WASHINGTON, D. C. 20006.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALBERT BRICK	)	
	)	
PLAINTIFF	)	
	)	
vs.	)	CIVIL ACTION NO. 1503-73
	)	
CPC INTERNATIONAL INC.	)	
	)	
DEFENDANT	)	

MEMORANDUM OF POINTS AND AUTHORITIES

1. AMENDED COMPLAINT FILED HEREIN.
2. RULE 23(c)(1), FEDERAL RULES OF CIVIL PROCEDURE.
3. RULE 1-13(b), UNITED STATES DISTRICT COURT RULES.

SAMUEL INTRATER
ATTORNEY FOR PLAINTIFF

COPY OF THE FOREGOING MEMORANDUM OF POINTS AND AUTHORITIES MAILED THIS 21ST DAY OF JUNE, 1974, TO CAHILL, GORDON AND REINDEL, ATTORNEYS FOR DEFENDANT, SUITE 900 FEDERAL BAR BUILDING WEST, 1819 H STREET, N. W., WASHINGTON, D. C. 20006.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALBERT BRICK PLAINTIFF VS. C-C INTERNATIONAL INC. DEFENDANT	)	CIVIL ACTION NO. 1503-73

STATEMENT AS TO NOTICE

COMES NOW THE PLAINTIFF, BY AND THROUGH HIS ATTORNEY, AND MAKES THE FOLLOWING STATEMENT PURSUANT TO RULE 1-13(c) OF THE UNITED STATES DISTRICT COURT RULES.

1. THE PLAINTIFF SHALL PROVIDE NOTICE IMMEDIATELY UPON AUTHORIZATION OF THIS COURT TO ALL THE OTHER MEMBERS OF HIS CLASS, CONSISTING OF ALL OF THE STOCKHOLDERS OF FUNK SEEDS INTERNATIONAL. THE IDENTITY OF SUCH MEMBERS OF THE CLASS MUST BE DETERMINED BY DISCOVERY AND HAS BEEN PREVENTED TO THIS POINT BY THE PREVIOUS ORDER OF THIS COURT.

2. SUCH NOTICE SHALL BE MADE BY DIRECT MAIL TO THE INDIVIDUAL STOCKHOLDERS, AS WELL AS BY PUBLICATION IN THE LEGAL NOTICE SECTION OF VARIOUS NEWSPAPERS. PAYMENT SHALL BE MADE BY THE PLAINTIFF.

3. THE RESPONSE TO SUCH NOTICE SHALL BE MADE TO SAMUEL INTRATER, 1025 VERMONT AVENUE, N. W., WASHINGTON, D. C., ATTORNEY FOR THE PLAINTIFF, OR TO SUCH OTHER PARTY OR OFFICE AS IS DIRECTED BY THIS COURT.

SAMUEL INTRATER
ATTORNEY FOR PLAINTIFF
1025 VERMONT AVENUE, N. W.
WASHINGTON, D. C. 20005
347-6953

COPY OF THE FOREGOING STATEMENT MAILED THIS 21ST DAY OF JUNE, 1974, TO CAHILL, GORDON AND REINDEL, ATTORNEYS FOR DEFENDANT, SUITE 900 FEDERAL BAR BUILDING WEST, 1819 H STREET, N. W., WASHINGTON, D. C. 20006.

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

ALBERT BRICK,	:	
Plaintiff,	:	Civil Action No. 1503-73
-against-	:	
CPC INTERNATIONAL INC.,	:	Richey, J.
Defendant.	:	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR AN ORDER DISMISSING THE AMENDED COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS DETERMINATION

CAHILL GORDON & REINDEL
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(202) 223-3350

Of Counsel:

Denis McInerney
Henry G. Bisgaier
Leonard A. Spivak
Ada Meloy

Dated: District of Columbia
July 3, 1974

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

ALBERT BRICK, Plaintiff,	:	
-against-	:	Civil Action No. 1503-73
CPC INTERNATIONAL INC., Defendant.	:	Richey, J.

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR AN ORDER DISMISSING THE AMENDED COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS DETERMINATION

Defendant, CPC International Inc. ("CPC"), pursuant to this Court's Civil Rule 1-9(b), submits this Memorandum of Points and Authorities:

(a) in support of defendant's motion for an order dismissing plaintiff's amended complaint with prejudice for failure to comply with the prerequisites of Rules 9(b) and 11 of the Federal Rules of Civil Procedure ("FRCP") and

(b) in opposition to plaintiff's motion for an order determining that the instant action be maintained as a class action.

Preliminary Statement

Point I below shows that, notwithstanding plaintiff's amendments of his complaint purporting to "further specify" his allegations of securities fraud in accordance with the provisions of this Court's order of April 29, 1974, the amended complaint still fails to comply with the specificity and certification requirements of FRCP 9(b) and 11. The allegations of wrongdoing contained in the amended complaint are not stated with particularity, are alleged at best upon "information and belief" without the required factual statement regarding the basis therefor, and were made solely on the basis of a magazine article without any factual investigation by plaintiff or his law partner who signed the complaint as counsel. Indeed, the "new" allegations of the amended complaint have even less than a neutral magazine article as purported support therefor.

Point II demonstrates that plaintiff's motion for class determination must be denied and plaintiff's class claims must be dismissed because of the inability of plaintiff -- due to his position as the law partner of his counsel and active participant in the prosecution of this case -- to serve as a "fair and adequate representative" as required by FRCP 23.

Point III sets out additional independent reasons for denying plaintiff's class determination motion -- i.e., failure to adequately comply with the requirements of this Court's Civil Rule 1-13, plaintiff's status as a stockholder who "bought in" long after public announcement of the events

complained of, plaintiff's conduct in soliciting members of the putative class, the lack of "forthrightness and vigor" on behalf of plaintiff and his counsel, and the ambiguity of the class definition offered by plaintiff.

Nature of the Case and Prior Proceedings

This action was instituted on July 26, 1973. The plaintiff is Albert Brick, and the amended complaint (as was the original complaint) is signed by Samuel Intrater as plaintiff's counsel.* Plaintiff and his counsel are practicing attorneys and the sole members of the firm of "Brick and Intrater, Counselors at Law, 605 Global Building, 1025 Vermont Avenue, N.W., Washington, D. C.".** Mr. Intrater has been Mr. Brick's law partner for the past "eighteen or twenty years" (Brick Dep., p.4).*** The sole defendant is CPC.

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* A copy of the original and amended complaints are annexed as Exhibits A and B to the affidavit of Denis McInerney in support of CPC's instant dismissal motion and in opposition to plaintiff's class determination motion (hereinafter "McInerney Aff."). A copy of CPC's answer to the amended complaint is annexed to the McInerney affidavit as Exhibit E.

** See Mr. Brick's deposition taken December 14, 1973 (hereinafter "Brick Dep."), pp. 3-4. A copy of the Brick deposition together with the exhibits marked in the course thereof have been filed with the Court. For the convenience of the Court, a copy of the Brick deposition was filed with CPC's motion papers in support of its motion to dismiss plaintiff's original complaint. A description of the exhibits to the Brick deposition and copies of said exhibits were respectively annexed as Exhibits D and E1 through E16 of the affidavit of Denis McInerney sworn to February 21, 1974 in support of CPC's prior motion.

*** The "Brick and Intrater" firm name appears on the letterhead of stationery used for correspondence with defendant's counsel in the instant litigation which identifies "Albert Brick" and "Samuel Intrater" as the members of the firm. See, e.g., February 21, 1974 affidavit, Ex. E3.

Prior Order of This Court Striking Derivative Claims, Permitting "Further Specification" of Allegations, and Enjoining Communication with Members of Putative Class

Subsequent to the receipt of the transcript of the Brick deposition (plaintiff having failed to bring on a motion for class determination within the time required by Local Rule 1-13(b) of this Court), CPC moved this Court for an order dismissing the complaint for failure to comply with FRCP 9(b) and 11, or in the alternative, granting CPC summary judgment on plaintiff's claim and derivative claims. CPC also sought an order restraining plaintiff and his law partner from soliciting or communicating with any other members of the putative class.

On April 26, 1974, argument was heard on defendant's motion. On April 29, 1974 the Court entered an order: (a) enjoining plaintiff and his counsel from communicating with members of the putative class; (b) striking the derivative allegations of the original complaint; (c) granting plaintiff leave to amend and further specify the remaining allegations of his complaint; and (d) otherwise denying defendant's motion without prejudice to renewal of any aspect thereof if plaintiff filed an amended complaint.*

* A copy of the Court's order is annexed as Exhibit C to the accompanying McInerney Aff.

The Amended Complaint

1. The Continued Assertion of Claims Relating to Funk's Pre-registration Dividend

The amended complaint in this action was filed on May 13, 1974. As was the case with the original complaint, in addition to Mr. Brick's individual claim the amended complaint purports to be brought on behalf of a class consisting of "all other stockholders of Funk Seeds International, Inc."

The amended complaint contains no derivative claims denominated as such. However, it is "verified" in the manner required by FRCP 23.1 for derivative actions and paragraph 3 of the amended complaint alleges an impropriety in the payment of a dividend by Funk to CPC "prior to the public offering" at the time Funk was a wholly-owned subsidiary of CPC. The payment of the dividend in July 1972 was fully disclosed in the subsequent registration statement and prospectus relating to the public sale of Funk common stock. Thus, there could be no claim that any shareholder was misled with respect to the dividend and plaintiff makes no such claim; he claims only that the dividend was "illegal and invalid."

The inability of Mr. Brick to assert a derivative claim with respect to the pre-public offering dividend was fully briefed in CPC's February 21, 1974 motion papers, which motion resulted in the Court's order of April 29, 1974 striking plaintiff's derivative claims. Moreover, the very recent decision by the United States Supreme Court in

Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co., ____U.S.____, [Current Binder] CCH Fed.Sec.L.Rep. ¶ 94,598 (June 19, 1974), conclusively held that shareholders may not assert derivative claims derivatively or by causing the corporation to sue for actions occurring prior to the acquisition of their shares.

The continued assertion of dividend claims in the amended complaint appears to be an attempt to reinstate allegations ordered stricken by the Court's April 29, 1974 order, said claims should, in any event, be peremptorily stricken from the amended complaint.

2. Continued Fundamental Deficiencies in the Substantive Allegations of the Amended Complaint

Although plaintiff purports to have taken advantage of the provision contained in this Court's order of April 29, 1974 granting plaintiff leave to "further specify" the allegations of his original complaint, the substantive allegations of the amended complaint are equally as deficient as those of the original complaint, if not more so. As was the case with the original complaint, three purported causes of action are stated for alleged violation of "The Securities Exchange Acts of the United States",* for common law fraud and for negligence. All three counts continue to center around the same basic events, the occurrence and announcement of each of which preceded Mr.

* Presumably Section 10(b) of the Securities Exchange Act of 1934, the only substantive provision of any federal statute referred to in the amended complaint. (The reference is contained in paragraph 1 which alleges the jurisdiction of the Court.)

Brick's purchase of Funk stock on February 14, 1973. The Second and Third Counts continue to merely repeat and reallege the allegations of the First Count.

The only substantive allegation contained in plaintiff's amended complaint (other than the dividend or derivative claim referred to above, is found in paragraph 2 thereof, which alleges:

> ". . . that the defendant was previously the sole owner of the stock of Funk Seeds International, Inc. That thereafter, in the summer of 1972, defendant made a public offering of the stock in said Funk Seeds International, Inc. That such offering resulted in a sale of approximately 75% of the shares of stock in said corporation at a price of approximately $24.00 per share which benefited the defendant to the extent of approximately $60,000,000.00 before taxes. . . ."

These facts are essentially correct, appear to be based upon public record, and, in any event, imply no wrongdoing on the part of anyone.

Paragraph 2 continues (with emphasis added to denote additions to the language contained in the original complaint):

> ". . . that at the time of such public offering and prior thereto, defendant was aware that certain franchising companies who had contracts with and dealt with Funk Seeds International had indicated a desire to terminate their franchise agreements and arrangements with Funk Seeds; that as a result of various contracts disputes between the said parties, there was an imminent prospect of extensive and multiple litigation with which the said Funk Seeds International, Inc., would become involved. . . ."

It is this passage of paragraph 2 of the amended complaint which constitutes the totality of the claims of wrongdoing which plaintiff asserts against CPC. The remainder of paragraph 2 is devoted to a listing of events which plaintiff asserts CPC "knew or should have known" would occur as a result of the "imminent termination of franchise agreements" and a conclusory recitation that the concealment of the "imminence" of termination and the resulting consequences constituted a violation of the federal securities laws:

> ". . . that said defendant further knew or should have known that upon the termination of such franchises, Funk Seeds would be seriously affected by heavy expenses resulting in the take-over from the franchise companies, that Funk Seeds would loose great sums of money from taking over certain inventories from said franchises; that furthermore, Funk Seeds might very well be legally obligated to purchase its inventory from such associates if either party terminated their contract. That all of the foregoing results from the imminent termination of franchise agreements were concealed by the defendant in the prospectus issued at the time of the above described public offering. That such non-disclosure of essential and material information in said prospectus constituted a violation of the Securities Exchange Acts of the United States and constituted illegal and fraudulent acts under such laws." [Emphasis added]

CPC submits that the added language -- presumably the "further specification" indicated by this Court's order of April 29, 1974 -- offered by plaintiff and his counsel in the amended complaint are no more than embellishments upon plaintiff's originally defective claim and that neither plaintiff nor his counsel can offer any factual basis for their "specified" allegations of securities fraud as required by FRCP 9(b) and 11. In short, CPC submits that the allegations of the second amended complaint* should be dismissed with leave to replead a fourth time expressly denied.

CPC further submits that plaintiff and his counsel appears to have misinterpreted the Court's order of April 29, 1974. In granting leave for "further specification", the Court could not have meant that the fundamental pleading requirements of FRCP 9(b) and 11 were to be ignored and that conjecture and speculation could be substituted for the requirement that allegations of securities fraud have a credible factual basis.** Yet, this is how plaintiff and his counsel appear to have interpreted the Court's order. The amended complaint, as was the case with the original complaint, remains utterly devoid of the requisite statement of factual basis and, as shown below, the amended complaint remains fatally deficient on its face.

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* As set forth in the accompanying McInerney Aff., plaintiff has recently moved to further amend his already once amended complaint. These amendments are not germain to the instant motions.

** In Oleck v. Fisher, [Current Binder] CCH Fed.Sec.L.Rep. ¶ 94,330 (S.D.N.Y. 1973), the Court stated:

> "We remind the plaintiffs that under the requirements of Rule 9(b), Federal Rules of Civil Procedure, the proposed amended complait must describe the circumstances constituting the fraud with particularity. . . ."

3. The Deletion of the Phrase "Upon Information and Belief"

In an apparent attempt to avoid the pleading requirements of FRCP 9(b) as interpreted by the decisions discussed below, plaintiff and his counsel have dropped the phrase "upon information and belief" from the amended complaint. As set forth below, where fraud allegations are made upon information and belief the complaint must also contain a statement of the factual basis for such allegations -- a statement which is not found in either the original or amended complaint submitted by plaintiff. The effect of the deletion of the phrase "upon information and belief" is to imply that the allegations are made upon actual knowledge.

It is clear that plaintiff may not escape the fundamental pleading requirement of FRCP 9(b) by the facile device of purporting to allege upon "knowledge" that which, at best, is alleged solely upon "information and belief". Moreover, FRCP 11, totally ignored by plaintiff and his counsel, requires that there be "good ground to support" any allegations contained in a pleading filed in a federal court whether asserted upon "knowledge" or upon "information and belief".

Thus, in Lewis v. Varnes, [Current Binder] CCH Fed. Sec.L.Rep. ¶ 94,343 (S.D.N.Y. 1974), the Court required either a proper factual showing, if the allegations of an amended complaint were to be based upon knowledge, or the requisite factual statement if the allegations were to be based upon "information and belief":

". . . Allegations of fraud have serious repercussions in the business world, and should not be cavalierly appended to other claims for their presumed in terrorem effect. See Fed.R.Civ.P. 11.

"Here, there is no support whatsoever for the conclusory allegations of fraud pleaded. Accordingly, the complaint is defective on this point and will be dismissed for that reason.

"The §10(b) claim is dismissed for failure to comply with Fed.R.Civ.P. 9(b), with leave to replead within 20 days upon a proper factual showing or, if upon information and belief, upon a full and sufficient assertion of the basis therefor." at p. 95, 159.

CPC submits that it is demonstrable that plaintiff's new "specified allegations" of securities fraud are, at best, based solely upon "information and belief", as follows: in his deposition testimony Mr. Brick testified that his original complaint was filed solely on the basis of a brief Forbes Magazine article, shortly after Mr. Brick read it and without any factual investigation by either himself or Mr. Intrater (Brick Dep., pp. 18, 54, 57-58). The Forbes article (a copy of which is annexed to the McInerney affidavit as Exhibit F) contains nothing which would support an accusation of wrongdoing against CPC and makes no such accusation. It merely recites the occurrence of the special Funk dividend while Funk was a wholly-owned subsidiary of CPC, the public offering, and the termination notifications (in November and December 1972) of various Funk associates.

With respect to the "further specified" allegations of the amended complaint, plaintiff has not provided any basis for said allegations. Further, the verification signed by plaintiff Brick at the end of the amended complaint recites

that "the facts set forth in the complaint are true to the best of his knowledge, information and belief." The amended complaint itself does not differentiate as to which allegations are made upon "knowledge" and which are made upon "information and belief". However, it is clear that it is the substantive allegations of paragraph 2 of the document which are those purportedly made "upon information and belief". And, as is obvious from the face of the complaint, there is no statement of the factual basis upon which any claim is asserted.

Under these circumstances, plaintiff's amended complaint should be dismissed for failure to comply with FRCP 9(b) and 11.

Other Relevant Facts

The following facts are relevant to the Court's consideration of the two motions before it.

On February 27, 1974 CIBA-GEIGY Corporation made a tender offer for Funk stock at $17 per share. Pursuant to said tender offer CIBA-GEIGY acquired 63% of Funk stock. Thereafter CIBA-GEIGY announced its intention to acquire the remaining outstanding Funk stock and to date, upon information and belief, has acquired a total of 90% of Funk stock. CIBA-GEIGY has further announced its intention to merge Funk into CIBA-GEIGY or one of its subsidiaries and has sufficient control of Funk that it can do so. Such a merger will completely eliminate all minority shareholders' interest in Funk.

On February 7, 1974 a class action was instituted in the Southern District of New York against Funk, CFC and others based upon the identical registration statement and prospectus which is the subject of the Brick action. Simon v. Funk Seeds, et al., 74 Civ. 645 (S.D.N.Y.). Although CFC has denied any and all liability in the New York action, there the Simon complaint is sufficiently pleaded under FRCP 9(b) and 11 and the defendants have not moved against it on that basis. On the face of the Simon complaint Mr. Brick would be a member of the class recited therein. (There has not yet been a ruling as to whether the Simon action may proceed as a class action.)

ARGUMENT

I.

THE AMENDED COMPLAINT STILL FAILS TO SATISFY THE REQUIREMENTS OF FRCP 9(b) AND 11

FRCP 9(b) requires that

> "In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity."

FRCP 11 provides that the signing of a pleading by an attorney "constitutes a certificate" by him that, inter alia, "to the best of his knowledge, information and belief there is good ground to support it."

Notwithstanding the clear direction provided by this Court in its order of April 29, 1974, the amended complaint still contains wholly conclusory allegations of wrongdoing. While the allegations of the original complaint were hastily concocted on the basis of a single magazine article without any effort at an underlying factual investigation (see Brick Dep., pp. 18, 54-58), the situation regarding the allegations of the amended complaint is worse yet. In an attempt to save their original pleading from its deserved fate, plaintiff and his counsel have made allegations for which there can be no possible credible basis for knowledge, information or belief.

A. The Amended Complaint Violates FRCP 9(b)

The authorities are uniform in their teaching that allegations of fraud are a serious matter and not to be lightly made. Particularly when charges of securities fraud are made solely upon information and belief (as is clearly the case here, notwithstanding the deletion of the words "upon information and belief"), there must be a sufficient factual basis for them appearing in the signed pleading.

In Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972), the Court of Appeals for the Second Circuit stated:

> "Rule 9(b)'s specificity requirement stems not only from the desire to minimize the number of strike suits but also more

> particularly from the desire to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing. . . .
>
> ". . . A complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one. . . ." (467 F2d at 607-08).

The Court held that complaints alleging fraud upon information and belief are subject to particular scrutiny:

> ". . .'[m]ere general allegations that there was fraud, corruption or conspiracy or characterizations of acts or conduct in these terms are not enough no matter how frequently repeated' [citations omitted]." (467 F.2d at 607).
>
> "The allegations violate the general rule that Rule 9(b) pleadings cannot be based 'on information and belief.' While the rule is relaxed as to matters peculiarly within the adverse parties' knowledge, the allegations must then be accompanied by a statement of the facts upon which the belief is founded." (467 F.2d at 608).

See also, Duane v. Altenburg, 297 F.2d 515, 518 (7th Cir. 1962); Lewis v. Varnes, supra; Hsue Tung v. Broussard, [Current Binder] CCH Fed.Sec.L.Rep. ¶ 94,471 (D.D.C. 1974), at p. 95,654; Competitive Associates, Inc. v. Fire Fly Enterprise, Inc., 59 F.R.D. 336 (S.D.N.Y. 1972).

In Felton v. Walston & Co., 73 Civ. 2200 (S.D.N.Y. March 29, 1974), the Court stated:

> "Because allegations of fraud made against accountants and others whose business depends upon clients' trust and confidence can threaten their entire professional status, Rule 9(b) requires that plaintiffs set forth more completely than in an ordinary complaint the circumstances that allegedly entitle them to relief." At p.7.

See also Sloan v. Canadian Javelin, Ltd., [Current Binder] CCH Fed.Sec.L.Rep. ¶94,579 (S.D.N.Y. 1974), dismissing an amended complaint with prejudice as against most defendants for continuing to fail to satisfy the specificity requirements of FRCP 9(b).

The amended complaint's allegations of fraud (¶ 2) must necessarily, in view of Mr. Brick's deposition testimony, be based entirely upon information and belief, and the amended complaint is still utterly devoid of any "statement of the facts upon which the belief is founded". For these reasons, and because these allegations are essential to all three counts, the amended complaint remains defective upon its face and must be dismissed with prejudice.*

Mr. Brick's deposition established that the fatal gaps in his original complaint accurately reflected the voids in his knowledge, information, or belief concerning the matters complained of, and that, as in Segal, his allegations were based essentially upon "unmitigated speculation" (467 F.2d at 608). Confronted with his own letter to the same effect, Mr. Brick freely admitted that his sole "inspiration" for this lawsuit was an article which appeared in Forbes Magazine shortly before the original complaint was filed (Brick Dep., pp. 17-18, 54-58).** Mr. Brick conceded (Dep., pp. 53-54) that on September 5, 1973, he wrote to Forbes

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* The amended complaint's fraud allegations (¶ 2) are essential to "Count I", which is based on the federal securities laws, and are repeated in the remaining "counts", which are apparently asserted under the Court's pendent jurisdiction and contain no allegations of diversity jurisdiction. Thus, dismissal of plaintiff's "First Count" necessitates dismissal of the entirety of plaintiff's amended complaint. United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

** A copy of the Forbes article is annexed to the McInerney affidavit as Exhibit F. It is a short item which

(Footnote continued on following page)

Magazine stating:

> "I am an attorney in Washington, D.C., and recently I filed suit against C.P.C. International and was actually inspired by an Article that appeared in your magazine on Page 18, August 1, 1973, issue." (McInerney Aff., Ex. E9).

(Compare Segal v. Gordon, supra, where the plaintiff had based his pleading on an article which he had "read in the Wall Street Journal", 467 F.2d at 609.)

Mr. Brick also acknowledged that "previous to reading that article, [he] had no idea of bringing a lawsuit against CPC" (Brick Dep., p. 54), and that he brought it almost immediately thereafter without conducting any factual investigation whatever (Brick Dep., pp. 18, 54, 56-57). Instead, Mr. Brick testified that it was "basically" correct that

> ". . . when [his] complaint alleges various matters on information and belief, that the only basis for that information and belief is [the] Forbes magazine article" (Brick Dep., p. 57).

(Footnote continued from preceding page)

> recounts the public offering, the special dividend, and the associates' terminations -- as to which the article relates that Funk itself had no forewarning or advance anticipation prior to the time the event occurred. While the article notes that since the terminations the value of Funk's stock has been depressed, it contains no imputation of any impropriety or wrongdoing.

Pressed as to the basis for his allegation that CPC "knew or should have known", prior to the public offering, that associate terminations would occur, Mr. Brick responded that he had conducted no investigation and had no information other than the reference to the terminations in the Forbes article, but that he had included the allegation merely because it was "possible" that this might have occurred (Brick Dep., p. 95). Thus, Mr. Brick had clearly engaged in precisely that sort of "unmitigated speculation" which Segal v. Gordon states is prohibited in securities fraud pleading (467 F.2d at 608).

It is equally clear that Mr. Brick's law partner, Mr. Intrater, performed no investigation prior to the filing of the original complaint. Mr. Brick testified:

> "I just told him [i.e., Mr. Intrater] all of the facts as I knew it and the background of it, and he prepared it [the complaint]." (Brick Dep., p. 6)

CPC submits that the most that plaintiff and his counsel will be able to say with respect to the "further specified" allegations of their amended complaint is that it is "possible" that said allegations are true. The very purpose of FRCP 9(b) and 11 is to spare defendants the expense and burden of litigating against claims based upon speculation and conjecture. In duPont v. Wyly, [Current Binder] CCH Fed.Sec.L.Rep. ¶ 94,381 (D.Del. 1974), the Court stated:

> "Rule 9(b)'s particularity requirement is designed 'to prevent irresponsible and improvident aspersions and charges of fraud.' 1A Barron & Holtzoff, Federal Practice and Procedure § 302 at 225 (Wright Ed., 1960). . . ." (at p. 95,320)

See also Lewis v. Varnes, supra.

B. The Complaint Also Violates FRCP 11

It also follows from the foregoing, we submit, that even when Mr. Intrater signed the amended complaint he had no knowledge or information sufficient to support a belief that there were "good grounds" to support the pleading. Hence, the "certificate" to that effect manifested by his signature on the amended complaint does not comply with FRCP 11.

The leading authority with respect to compliance with FRCP 11 is Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966). There, the Supreme Court, in upholding a complaint against a Rule 11 challenge, stated that "grave charges of fraud" must be "shown by the record to be based on reasonable beliefs growing out of careful investigation . . ." (383 U.S. at 373). In Surowitz, persons acting on behalf of the named plaintiff had made a detailed investigation of the basis for the fraud complaint and had explained the charges to the plaintiff prior to the filing of the complaint. Here, as we have seen, there was absolutely no factual investigation prior to the filing of the original complaint or the amended complaint.* See also, Lewis v. Varnes, supra.

For obvious reasons, FRCP 11 has particular applicability to those who volunteer to represent the rights of

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* In Segal v. Gordon, supra, the Second Circuit, commenting upon the lack of compliance with FRCP 9(b), noted that "the first complaint was obviously filed on the basis of little investigation and research". In a footnote, the Court invited comparison to "the investigation and research done . . . in Surowitz v. Hilton Hotels Corp. . . ." (467 F.2d at 608). We respectfully invite the same comparison in the instant situation.

strangers who had no voice in choosing them in alleged class or derivative actions. Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971), put it this way:

> "It must be presumed, or at least firmly expected, that responsible lawyers before they put their names to class allegations, will have made some minimally careful explorations to satisfy themselves of the prima facie existence of a class, a claim on behalf of the class and their suitability to present themselves in the fiduciary role of class representatives." (52 F.R.D. at 495).

Here, it is evident that the required "minimally careful exploration" was never performed properly, if at all.*

II.

PLAINTIFF'S STATUS AS THE LAW PARTNER OF PLAINTIFF'S COUNSEL ACTIVELY PARTICIPATING IN THIS LITIGATION, PRECLUDES HIS STANDING AS AN ADEQUATE CLASS REPRESENTATIVE

FRCP 23 provides, as a prerequisite to a class action suit, that it must appear that "the representative parties will fairly and adequately represent the interests of the class." Similarly, this Court's Civil Rule 1-13(a)(2)(ii) requires that a class action complaint must contain "appropriate allegations justifying" the claim that the suit is maintainable as a class action, including,

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* The haste with which the original complaint was put together is indicated by the fact that it was filed prior to the date of the Forbes magazine issue containing the article which "inspired" plaintiff to sue. See Exhibit F to the accompanying McInerney Aff. and Ex. E9 to the February 21, 1974 McInerney Affidavit. Even allowing for the fact that such publications are sold at newsstands in advance of the dates they bear, it seems obvious that there was little, if any, time for careful exploration. Although the amended complaint was filed 15 days after the Court's Order of April 29, 1974, it seems clear that neither plaintiff nor his counsel utilized their time to perform any investigation on which to base their "further specified" allegations of fraud.

in particular, "the basis upon which the plaintiff . . . claims to be an adequate representative of the class."

In the instant case, Mr. Brick's status as a partner of plaintiff's counsel and his active participation as an attorney in the prosecution of this action, preclude a finding of adequate class representation.

A. Nature of the "Adequate Representation" Requirement

The "adequate representation" requirement is a result of the self-appointed fiduciary role volunteered for by the representative party and his counsel vis-a-vis those whom they purport to champion but who have had no voice in selecting them. See Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973):

> "[I]n addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court."

As a consequence of the fiduciary nature of the class representative role, the "courts have expressed particular concern" for this requirement and "carefully scrutinize the adequacy of representation in all class actions." Eisen v. Carlisle & Jacquelin [Eisen II], 391 F.2d 555, 562 (2d Cir. 1968).

In judging the ability of a volunteer class representative to act in that fiduciary capacity, this Court and others have held that there is an irreconcilable conflict of interest, which precludes a finding of adequate

representation, when the roles of plaintiff and counsel become entangled.

The nature of this conflict was spelled out precisely by the Court of Appeals for the Second Circuit in Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972):

> "There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent. While, in a general sense, both are interested in maximizing the recovery this is only a half-truth. Even apart from special considerations which, as has been noted, may cause special divergence of interest in cases where extremely large amounts are at stake, . . . there is a difference in every case. The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, simpliciter; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal [citations omitted]."* (Emphasis added)

The foregoing concepts were recently applied by this Court to deny class action status to attorney-litigants in Graybeal v. American Savings & Loan Ass'n, 59 F.R.D. 7 (D.D.C. 1973, Richey, J.), where a putative class action had been brought by a husband and wife pursuant to the Truth-in-Lending Act and the Sherman Antitrust Act. The husband was one of the attorneys who sought to represent the plaintiff class. Denying class action status, this Court held that

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* Although Saylor v. Lindsley was a derivative action, it is clear that the Court's rationale is at least equally applicable in class action situations. See In re Value Line Special Situations Fund Litigation, [Current Binder] CCH Fed.Sec.L.Rep. ¶ 94,601 at 96,132 (S.D.N.Y. 1974) where the close relationship of adequacy of representation requirements of Rules 23.1 and 23(a)(4) is acknowledged.

the plaintiffs could not "adequately protect the interests of the proposed class while concurrently acting as attorneys for the class in the same action." (59 F.R.D. at 12). With respect to the overlapping of the roles of litigant and lawyer, and the resulting conflicts, this Court found:

> ". . . [Plaintiffs] have failed to demonstrate to the Court's satisfaction that they will fairly and adequately protect the interests of the class. Plaintiffs have placed themselves in the dual roles of attorneys for, and representatives of, the proposed class. These dual roles are inherently fraught with potential conflicts of interests. In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here, the attorney is also the representative who brought the action on behalf of the class, ...
>
> "Due process demands that the rights of potential class members be protected. These rights can only be protected by adequate and proper class representatives. Plaintiffs have not shown themselves to be such." (59 F.R.D. at 13-14; Emphasis added)

In Platt v. B.P. Oil Corp., 72 Civ. 651, Unreported Decision (S.D.N.Y. Nov. 19, 1973), the Court denied class action status on the ground, inter alia, that

> "the plaintiff has not sufficiently demonstrated his ability to adequately represent the proposed class. The plaintiff, an attorney, is represented by his partner in the two-man firm of Levy & Platt, Esqs. The potential conflicts inherent in such representation are obvious." (p. 4; Emphasis added)

To the same effect, see Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972), where the Court, presented with a would-be class representative who was also co-counsel in the action, denied class action status, noting:

> "The difficulty I have with this situation lies in the fact that the possible recovery of Mr. Cotchett as a member of the class is far exceeded by the financial interest Mr. Cotchett might have in the legal fees engendered by this lawsuit. . . .
>
> "Thus, it may well be '. . . that plaintiff has interests antagonistic to those of the remainder of the class.'" (56 F.R.D. at 554).

In Stull v. Pool, [Current Binder] CCH Fed.Sec.L. Rep. ¶ 94,533 (S.D.N.Y. April 30, 1974), the Court, after assuming "without deciding . . . that this action is an appropriate one for class action treatment," denied class action treatment because the plaintiff was the wife of a member of the law firm which sought to represent the class:

> "The potential conflict of interest inherent in this situation is obvious. To paraphrase an observation of this Court in Cotchett v. Avis, 56 F.R.D. 549 (S.D.N.Y. 1972), the difficulty I have with this situation lies in the fact that the possible recovery of Mrs. Stull as a member of the class is far exceeded by the financial interest she and her husband, as a marital unit, might have in the legal fees engendered by this lawsuit. A number of recent decisions accord with this view." (at p. 95,850).

Other courts have also denied class action status in similar situations. See, e.g., Shields v. First National Bank, 56 F.R.D. 442 (D.Ariz. 1972); Shields v. Valley National Bank, 56 F.R.D. 448 (D.Ariz. 1972); Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D.Wisc. 1972).

In Shields v. First National Bank, supra, the Court observed that co-mingling of the roles of class representative and counsel "does not seem to the court to comport with the high quality of objectivity, duty and integrity required of lawyers practicing in this court or elsewhere." (56 F.R.D. at 444).

Likewise, in Krieger v. European Health Spa, Inc., supra, the Court stated:

> "The plaintiff, as an attorney associated with the firm representing him in this action, cannot in law, 'fairly and adequately protect the interests of the class.'
>
> "All parties agree that a burdensome ethical question would be raised if the plaintiff were to be called as a witness while his firm is employed in the matter. The plaintiff responds that he can pursue the matter without testifying, or, if he should be required to testify, his employers can withdraw as counsel. I find the latter solution unsatisfactory. A person wishing to represent a class must be able to demonstrate 'the forthrightness and vigor . . . which the representative party can be expected to assert.' . . . This plaintiff has commenced an action under the disability that no other member of the class is likely to have, an inability to testify except at the cost of withdrawal of counsel familiar with the case from its inception. It is not enough to say that his testimony may not be needed; the possibility of such a need makes him less capable of adequate representation than others in the class [citations omitted]." (56 F.R.D. at 105-06; Emphasis added)

In short, whenever there is an entangling or comingling of the attorney's role and that of the representative plaintiff, the "adequate representation" requirement of FRCP 23 cannot be satisfied. This is especially so where, as here, the volunteer representative is represented by his only law partner. In such a situation, additional public policies come into play, and they dictate that even the "appearance of impropriety" must be avoided in order to establish "public confidence in the integrity of the judicial process." Handelman v. Weiss, [1973 Transfer Binder] CCH

Fed.Sec.L.Rep. ¶ 94,214 at 94,842-43 (S.D.N.Y. 1973).*

Thus, in Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045 (2d Cir. 1973), the Second Circuit noted that an attorney involved in a class action litigation -

> ". . . shares with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorneys' fees. See 7A C. Wright & A. Miller, supra, at § 1803." (481 F.2d at 1050).

In Liebman v. J.W. Peterson Coal & Oil Co., 1974 Trade Cas. ¶ 75,117 (N.D.Ill.1974) the Court observed:

> "The principal attacks on the Rule [FRCP 23] are largely the result of conduct by counsel for plaintiffs in some cases who have acted as though the rule was adopted for their benefit rather than for the multitude of individuals comprising the class or classes whose rights they were presumably vindicating." (at p. 96,985)

Indeed, this Court, in addition to its Graybeal decision discussed above, has commented upon the potential for abuse in class action situations. In Kiser v. Miller, 364 F.Supp. 1311, 1315-1316 (D.D.C. 1973) this Court observed:

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* See DR 5-101 of the ABA Code of Professional Responsibility which provides:

> "(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. . . ."

None of the exceptions to DR 5-101(B) are applicable here, and it is obvious that Mr. Brick, the party plaintiff, will be a witness. He was represented at his deposition by Mr. Intrater, with the interesting results noted below.

Further, among the elementary proscriptions governing "the relations of partners in a law firm" is that -

> "neither the firm nor any member or associate thereof, may accept any professional employment which any member of the firm cannot properly accept." (American Bar Association, Code of Professional Responsibility, p. 23, n. 29).

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> "[T]he attorneys who are taking advantage of class actions to obtain lucrative fees will find themselves vulnerable to the criticism expressed in the Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden.'"

From the foregoing authorities, one cardinal rule emerges - in order to avoid conflicts of interest and possible violation of fiduciary duty, the roles of representative litigant and counsel must be kept entirely separate and distinct or there can be no finding of "adequate representation."

B. Mr. Brick Is Not and Cannot Be an "Adequate Representative"

The present case presents a classic illustration of the appearance of impropriety arising from an entangling and co-mingling of the attorney's and litigant's roles that the "adequate representation" requirement of FRCP 23 was designed to prevent.

The plaintiff, Mr. Brick, is and for the past "eighteen or twenty years" has been the law partner of Mr. Intrater which "means that [he has] some arrangement for the sharing of fees with Mr. Intrater" (Brick Dep., p. 4). Mr. Brick testified under oath that it was "the law firm of Brick and Intrater that is representing [him]" in this action (Brick Dep., p. 40; see also pp. 14, 44, 48-50, 60, 62-63 and 74). Mr. Intrater then interjected that he alone was representing his law partner, who promptly changed his testimony and adopted "absolutely" Mr. Intrater's suggestion (Brick Dep., p. 41). Neither Mr. Brick nor Mr. Intrater were able to reconcile this, or other conflicts in plaintiff's

deposition testimony, in light of the facts that (i) although he has separate stationery (Brick Dep., p. 37), all of Mr. Intrater's correspondence in the case has been sent under the letterhead of "Brick and Intrater" (Brick Dep., p. 65); (ii) payment of various disbursements has come out of the funds of the Brick and Intrater firm (Brick Dep., p. 44); (iii) most of the legal and factual work in this case (including the drafting of plaintiff's notice to produce and contacts with possible plaintiffs and witnesses) has been personally performed by Mr. Brick (a detailed list with references to the Brick deposition is set forth below); and (iv) Mr. Brick will "absolutely" share in the attorneys' fee in this action "in accordance with [his] normal share of the partnership" if the Court permits him to do so (Brick Dep., p. 45).*

In his testimony, Mr. Brick repeatedly argued his inability to distinguish between his roles as lawyer and litigant and thus (unintentionally) put his finger on the precise "sore spot" which disqualifies him from serving as a class representative. Commenting on the various legal functions which he had performed, Mr. Brick stated, inter alia,

> "In a two-man firm I might say it is pretty hard to distinguish between one and the other. . . . (Brick Dep., p. 35).

---

* Mr. Brick, in addition to acknowledging the existence of a general fee sharing arrangement with Mr. Intrater, also confirmed that "there is not any understanding that he will not share in any fee that may be recovered by Mr. Intrater or Brick and Intrater" (Brick Dep., pp. 4, 49).

> "[D]on't forget, there is a very slim line of demarcation between being a lawyer and being a party to the suit. (Brick Dep., p. 38).
>
> "[T]he fact that I am a lawyer incidentally puts me in the spot I suppose of any lawyer who files a suit on behalf of himself could be accused of the same thing." (Brick Dep., p. 39).

As demonstrated in Point II(A), supra, the requirements of FRCP 23 and the ABA Code of Professional Responsibility are founded upon identical considerations. The suspicion created by the equivocation and retractions manifested throughout Mr. Brick's deposition is precisely what these requirements are designed to foreclose; and the illustrations of it here are numerous.

For example, Mr. Intrater repeatedly cautioned Mr. Brick and refused to allow him to respond to pertinent questions which would shed light on the nature of their fee sharing arrangement in this case (Brick Dep., pp. 50, 109).

Even more troublesome are the flat self-contradictions in Mr. Brick's testimony. When he was asked about his own work in connection with the action, Mr. Brick initially insisted that "I haven't prepared anything in connection with this case since the case started" and "that includes the drafting of papers" (Brick Dep., pp. 11-12). In particular, Mr. Brick repeatedly insisted that he had not prepared plaintiff's Rule 34 Notice to Produce Documents stating that the

document had been prepared by Mr. Intrater.* As a consequence of this denial, it was necessary to go through the tortuous course of establishing (a) that plaintiff's Notice to Produce had incorporated verbatim certain language from defendant's Notice to Produce, and (b) that defendant's Notice to Produce was received and plaintiff's Notice drafted and served during a time when Mr. Intrater was out of the country (Brick Dep., pp. 32-34). Faced with these facts, Mr. Brick reversed his prior testimony:

> "The Witness: I would like to say this: Come to think of this, I think I prepared this thing basically in toto, even though I had discussed it with Mr. Intrater previously."
>
> "By Mr. McInerney:
>
> "Q. That is Defendant's Exhibit 6?
>
> "A. Yes." (Brick Dep., p. 33).

Moreover, Mr. Brick conceded that he has performed a plethora of legal functions relating to this litigation, including -

(i) legal research following his reading of the Forbes article (Brick Dep., pp. 12, 18-19, 57);

---

* "Q. Now my question, Mr. Brick, is whether you prepared Defendant's Exhibit 6 [plaintiff's Rule 34 notice]?

"A. No, I did not. (Brick Dep., p. 25.)

"Q. He [Mr. Intrater] prepared Defendant's Exhibit 6?

"A. That is correct." (Brick Dep., p. 29.)

(ii) factual research after the institution of this action,* including letters to Funk's president (Brick Dep., pp. 36-38, 51; Ex. 7), Funk's counsel (Brick Dep., pp. 52-53; Ex. 8), Forbes Magazine (Brick Dep., pp. 53-55; Ex. 9), oral and written communications with the SEC (Brick Dep., pp. 59, 61-62, 65-67, 69-71; Exs. 11 and 12), and a letter to a lawyer on the staff of the Magnuson Committee (Brick Dep., pp. 72-74; Ex. 14);

(iii) the drafting and sending of plaintiff's Notice to Produce Documents (Brick Dep., p. 35; Ex. 6);

(iv) the drafting and sending of other legal communications to counsel for CPC (Brick Dep., p. 7); including a letter on the letterhead of Brick and Intrater, dated November 29, 1973 (Ex. 3),** and a letter on the letterhead of Albert Brick, Esq. dated September 25, 1973 (Ex. 5); and

---

* In fact, the understanding between Messrs. Brick and Intrater with respect to the litigation was that Mr. Intrater would handle the legal aspects and Mr. Brick would handle the factual aspects (Brick Dep., pp. 50-51).

** Mr. Brick denied that he wrote this document (Brick Dep., pp. 11, 42), but his initials appear thereon as having dictated it. The appearance of Mr. Brick's initials indicate that it is probable that he wrote the letter (Brick Dep., p. 70).

(v) communicating as an attorney with other potential class members (Brick Dep., pp. 13-17, 74-76, 87-90; Ex. 15(a) - 15(e)) and communicating with and sending copies of pleadings to several law firms (Brick Dep., pp. 76-77).

Mr. Brick testified that, in performing these functions, he was, inter alia, "acting as a lawyer", "moving the case along", "seeking what we lawyers call discovery" and "furthering the suit by seeking discovery" (Brick Dep., pp. 31, 35, 36, 38). Mr. Brick acknowledged that his firm's clients do not normally draft or mail such things as notices to produce documents or communicate with the SEC or Congressional Committees (Brick Dep., pp. 31, 105, 106).

Finally, Mr. Brick has also engaged in other legal activities of a more dubious propriety, including consultation with and solicitation of various potential litigants, and at one point asserted that he intended to continue this practice (Brick Dep., pp. 88-91).

In sum, the conflict of interest arising from the nature of the Brick and Intrater relationship is here reinforced by the potpourri of legal activities which have been pursued by Mr. Brick. In such a situation, under the authorities discussed in Point II(A) above, the "adequate representation" requirement of FRCP 23 cannot be satisfied.

III.

ADDITIONAL REASONS WHY PLAINTIFF'S CLASS DETERMINATION MOTION MUST BE DENIED AND HIS CLASS ALLEGATIONS DISMISSED

In addition to failing to satisfy the "adequate representation" requirement of FRCP 23, denial of plaintiff's class determination motion and dismissal of the class allegations of the amended complaint are also mandated for the following independent reasons:

A. Failure to Comply with this Court's Rule 1-13

Rule 1-13(a) of this Court's Civil Rules requires that "[i]n any case sought to be maintained as a class action":

> "the complaint shall contain under separate heading, styled 'Class Action Allegations':
>
> (1) A reference to the portion or portions of Rule 23, Federal Rules of Civil Procedure, under which it is claimed that the suit is properly maintainable as a class action.
>
> (2) Appropriate allegations justifying such claim, including, but not necessarily limited to:
>
> (i) the size (or approximate size) and definition of the alleged class;
>
> (ii) the basis upon which the plaintiff (or plaintiffs) claims to be an adequate representative of the class . . .;
>
> (iii) the alleged questions of law and fact claimed to be common to the class; and
>
> (iv) in actions claimed to be maintainable as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure, allegations supporting the findings required by that subdivision."

It is clear that plaintiff has given no more than lip service to Rule 1-13, despite the fact that plaintiff's failure to comply with the Rule was called to his attention in CPC's prior motion. Thus, plaintiff asserts in the most conclusory form that he is "a fit and proper person who will fairly and adequately represent the class," and that there are "common questions of law and fact applicable to all members of the class". Plaintiff does not specify his qualification. Nor does the amended complaint disclose the fact that plaintiff "bought in" well after the events of which he complains were fully disclosed thus creating a predominating question uniquely applicable to him -- i.e., does he have any claim whatsoever to assert in this action.

Additionally, plaintiff cannot even estimate the size of the class he purports to represent, complaining that he "has been prohibited by this Court from contacting any of the other members of the class." Plaintiff should realize that the purpose of the Court's injunction against communicating with class members was not to impede him from ascertaining the size of the putative class by other means; it merely prohibits soliciting class members to participate in the class as named plaintiffs -- a course of conduct which is only too amply documented by Mr. Brick's deposition (see discussion of Solicitation below).

B. The Burden of Proving that a Class Action May Be Maintained is on the Plaintiff

Wholly apart from the pleading requirements of this Court's Civil Rule 1-13(a), it is axiomatic that a

would-be class representative has the burden of proving (by facts, not unsupported allegations) that all the requisites of Rule 23 have been satisfied before he or she will be permitted to maintain an action as a class action and to represent the putative class. Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D.Pa. 1968); 7A Wright & Miller, Federal Practice and Procedure, §1798 at 244 (1972). Here, as noted above, Messrs. Brick and Intrater have compiled a series of generalized, vague and unsupported allegations which cannot meet the requirements of FRCP 23 or of this Court's Civil Rule 1-13(a) DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968). See Cash v. Swifton Land Corporation, 434 F.2d 569 (6th Cir. 1970); William Goldman Theatres, Inc. v. Paramount Film Dist. Corp., 49 F.R.D. 35 (E.D.Pa. 1969).

C. Plaintiff is Atypical and Not an Appropriate Class Representative because of the Late Date of his Purchase of his Funk Stock

1. Latent Ambiguity in Plaintiff's Class Definition

As set forth in the amended complaint plaintiff purports to represent "all of the stockholders of Funk Seeds International, Inc." Plaintiff does not state whether he means all present shareholders of Funk or all persons who ever purchased Funk common stock. The difference is quite significant since, as a consequence of CIBA-GEIGY's acquisition of 90% of Funk's stock, and its announced intention of merger, it will soon be the only Funk stockholder. Even now

there is hardly a "class" of present Funk stockholders.

2. Plaintiff's Belated Stock Purchase Makes his Claim Atypical of Those of the Vast Majority of Persons Who Purchased Funk Stock

Even assuming a broader class definition than present Funk stockholders, it is clear that Mr. Brick is not in a position to represent the vast majority of Funk stockholders. It is, moreover, quite probable that Mr. Brick has no claim which he can assert -- either individually or on behalf of any class -- concerning the matters referred to in his complaint.

Mr. Brick purchased his Funk shares on February 14, 1973. However all of the matters complained of had occurred well prior to Mr. Brick's purchase of his Funk stock, and, as demonstrated in the February 21, 1974 McInerney Affidavit (¶ 8), most or all were publicly known at the time. The public offering had been announced and completed approximately six months before; the special dividend had been declared even earlier; and full disclosure of both the dividend and the manner in which it was financed was contained in the prospectus accompanying the public offering.* The only act of alleged wrongdoing referred to in the complaint which had not occurred at the time of the public offering relates to

* Mr. Brick testified that he did not obtain a copy of the prospectus (which was readily available to anyone) until after the lawsuit was instituted (Brick Dep., pp. 85-86). Clearly, Mr. Brick has no standing to represent persons who purchased their Funk stock at the time of the public offering and in reliance upon the prospectus.

the associate terminations. But even those events preceded Mr. Brick's acquisition of his Funk stock by about two months, and had been publicly announced by Funk prior to his purchase, so that he either knew or should have known of them. See February 21, 1974 McInerney Aff., ¶ 8; Ex. G.

Indeed, there is substantial evidence that these terminations were in fact actually known to Mr. Brick before he bought his Funk stock. He testified that his February 1973 purchase of Funk stock occurred as the result of a suggestion by his securities broker who sent him a two-page "in-house statement" relating to Funk which Mr. Brick read and then threw away, and that he did not rely on any other document or representation (Brick Dep., pp. 83-85). Annexed to the February 21, 1974 McInerney Affidavit as Exhibit H is a copy of a two-page document issued by Loeb, Rhoades & Co., Inc., Mr. Brick's broker, dated December 18, 1972, which is undoubtedly the "in-house statement" received by Mr. Brick. Of particular importance is the fact that this document fully discloses the termination by Funk's two largest associates. As set forth in the February 21, 1974 McInerney Affidavit (¶ 8; Ex. G), the remaining associate terminations were also publicly announced by Funk prior to Mr. Brick's acquisition.

It thus appears that Mr. Brick either knew or should have known of the very facts which his complaint alleges were unknown to him. Since notice of facts allegedly omitted or misrepresented defeats any claim for relief under the Securities Exchange Act of 1934, Mr. Brick is barred from bringing such a claim. Tcherepnin v. Franz, 461 F.2d

544, 552 (7th Cir.), cert. denied sub nom. Lowenthal v. Tcherepnin, 409 U.S. 1038 (1972) [purchasers ". . . could not have been defrauded as alleged in the complaint if they had had notice of CSA's troubles"]; Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962).

If Mr. Brick does not himself have a claim, he may not represent a class of persons who, arguendo, may have one. Bailey v. Patterson, 369 U.S. 31 (1962); Greenstein v. Paul, 275 F.Supp. 604 (S.D.N.Y. 1967), aff'd, 400 F.2d 580 (2d Cir. 1968); Kauffman v. Dreyfus Fund, Inc.,434 F.2d 727 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971); Mintz v. Mathers Fund, Inc., 463 F.2d 495 (7th Cir. 1972); Kansas City, Missouri v. Williams, 205 F.2d 47 (8th Cir.), cert. denied, 346 U.S. 826 (1953); Washburn v. Madison Square Garden Corporation, 340 F.Supp. 504 (S.D.N.Y. 1972).

In sum, there clearly are substantial matters of fact and law concerning defenses to Mr. Brick's personal claim which not only make his claim atypical and preclude him from representing any class in this action, but also demonstrate that his claim is lacking in substantive merit.

D. Mr. Brick Has Not Demonstrated the "Forthrightness and Vigor" and Other Qualifications Required of a Class Representative

One of the decisive elements courts look for in determining whether a particular party shall be a class representative is whether that party has demonstrated sufficient interest to convince the court that he will prosecute the action with the required "forthrightness and vigor." Kriger v. European Health Spa, Inc., supra, at 105-06. In

Mersay v. First Republic Corporation of America, 43 F.R.D. 465 (S.D.N.Y. 1968), the Court stated:

> "The proper inquiry is not merely whether plaintiff is a suitable representative, in that his background and relationship might defeat his recovery, but whether he will in fact adequately protect class interests." (43 F.R.D. at 469-70).

The Court further stated:

> "These authorities indicate clearly that the primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process." (Ibid.)

Here, Messrs. Brick and Intrater continue to ignore the basic pleading requirements of FRCP 9(b) and 11 as well as other provisions of the FRCP, this Court's Rules applicable to class actions, and the substantive requirements of the solitary provision of the federal securities laws which they purport to invoke -- § 10(b) of the Securities Exchange Act of 1934. See Point III C, above.

In this connection, in Felton v. Walston & Co., 73 Civ. 2200 (S.D.N.Y. March 29, 1974), another purported class action brought by a plaintiff-attorney, the Court observed:

> "[P]laintiff Felton, though an attorney, is a single practitioner whose experience has been in the 'negligence field,' rather than in securities litigation . . . plaintiff has never before been designated a class representative nor has he served as counsel to a class in any sort of class action. Plaintiff stated at his deposition: 'I could not afford the time it would take on this particular case if I didn't have [a fee for representation of the class] in mind. That is one of the main purposes of Rule 23.' Accordingly, the Court finds that

> Mr. Felton's experience and skills in negligence litigation do not qualify him adequately to protect the interests of the class he seeks to represent." (at p. 9).

There is, however, a more substantial impediment to class action status in this case. It is quite clear that Mr. Brick, the named plaintiff, did not know that his action had been brought as a class action or initially regard it as such. Thus, Mr. Brick initially testified that "I don't represent any class. I hope to represent anybody who wants to join the action" (Brick Dep., p. 79). He responded "No sir" to the specific question whether he represented a class (ibid.). Mr. Intrater then stated that it was his intention in drafting the complaint to bring the action as a class action (ibid.). Subsequently, Mr. Brick confirmed that he thought that it was Mr. Intrater's idea to bring the action as a class action (Brick Dep., p. 82).

Given the fiduciary status of a class representative (Point II(A), supra), and the requirement of forthrightness and vigor of representation, it is at a minimum necessary that the impetus for bringing an action as a class action lies with the class representative and that the class representative know that the action is brought as a class action and express his willingness to undertake his fiduciary responsibilities as a class representative. Samuel Greenfield Fund Inc. v. Genesco, Inc., et al., Unreported Decision, 72 Civ. 4533 (S.D.N.Y. June 28, 1974). It would seem improper for the impetus to come from the attorney rather than the named plaintiff. Cf. Stavrides v. Mellon National Bank & Trust Co., 60 F.R.D. 634 (W.D.Pa. 1973). In this regard,

Judge Friendly's observation in Saylor v. Lindsley, supra, is pertinent:

> "[W]e are not willing to . . . accept the view that the attorney for the plaintiff is the dominus litis and the plaintiff only a key to the courthouse door dispensable once entry has been effected." (456 F.2d at 900)

E. Solicitation of Members of the Putative Class

The potential for abuse of the class action by attorneys, and solicitation in particular, has been widely recognized in recent years. See, e.g., Manual for Complex and Multidistrict Litigation, West Pub. (1970) § 1.61, p. 15. "The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse." Manual for Complex Litigation, CCH (1973) § 1.41, p. 11. The major abuses are "unreasonable charges for attorneys' fees and expenses," and "improper solicitation of legal representation" (Id. § 1.47, p. 28). The Manual for Complex Litigation also states:

> "In the absence of some preventive action by the court, formal parties to the action or counsel for the formal parties may directly or indirectly, without knowledge or consent of the court, solicit from the potential or actual members of the class (or subclasses) who are not formal parties, funds for attorneys' fees and expenses, or agreements to pay fees and expenses. To the party solicited, solicitation may appear to be an authorized activity approved by the court, simply by reference to the title of the court, the style of the action, the name of the judge, and to official processes. Such unapproved solicitation may be of doubtful ethical propriety and may result in well founded dissatisfaction with the judicial management of the action. In order to guard against unapproved action of this sort, it is recommended that each court adopt a local rule forbidding unapproved direct or indirect written and oral communications by formal

> parties or their counsel with potential and actual class members, who are not formal parties, provided that such proposed written communications submitted to and approved by order of court may be distributed to the parties or parties designated or described in the court order of approval."

These abuses have been widely recognized by the courts. For example, in Sherman v. H&R Block, Inc., 354 F.Supp. 1405, 1407 (E.D.Pa. 1973), the court noted:

> "Since the 1966 amendments, F.R. 23 and 23(b)(3) in particular have been used more and more frequently as a device to solicit litigation and as a means for an attorney to achieve his 'pot of gold.' The number of class action complaints filed has soared, and the original object of the rule--judicial economy--seems to have been forgotten."

See also, Buford v. American Finance Co., 333 F.Supp. 1243, 1251 (N.D.Ga. 1971):

> "[T]he plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated."

To the same effect, see Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237, 239 (N.D.Tex. 1972). There, an attorney who was not a named plaintiff but was a member of the class solicited others to serve as the class representatives. This involvement by the attorney was a factor in the denial of class status.

Here, Mr. Brick has written to others to stir up interest in his litigation and has testified to oral contacts with one or more members of the alleged class in which he solicited participation in the instant suit (Brick Dep., pp. 16-17; Ex. 15(a) - 15(e)). He also stated, in his response to defendant's Rule 34 request and his testimony, that he intended

to contact other Funk stockholders to ascertain whether they wished to join his suit (Brick Dep., pp. 89-90; Ex. 6). These activities led to this Court's Order of April 29, 1974 prohibiting plaintiff and his counsel from communicating with members of the putative class.

IV.

LEAVE TO REPLEAD SHOULD BE EXPRESSLY DENIED

As set forth above, plaintiff, having been given a second (and, indeed, a third) chance to adequately plead his allegations of securities fraud in compliance with FRCP 9(b) and 11, is still unable to do so. Under these circumstances, CPC submits that plaintiff should be expressly denied leave to replead. Leave to replead was expressly denied under virtually identical circumstances in Segal v. Coburn, [1973 Binder] CCH Fed.Sec.L.Rep. ¶ 94,002 (E.D.N.Y. 1973); Washburn v. Madison Square Garden Corp., 340 F.Supp. 504 (S.D.N.Y. 1972); Sloan v. Canadian Javelin, Ltd., [Current Binder] CCH Fed.Sec.L.Rep. ¶ 94,579 (S.D.N.Y. 1974).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that CPC's motion to dismiss plaintiff's

complaint with prejudice be granted and that plaintiff's motion for class determination be denied and the class allegations dismissed.

Dated: District of Columbia
July 3, 1974

Respectfully submitted,

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Ada Meloy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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TRANSCRIPT OF PROCEEDINGS

ALBERT BRICK, Plaintiff;	:	
vs.	:	Civil Action No. 1503-73
CPC INTERNATIONAL INC., Defendant.	:	

Deposition of: ALBERT BRICK

Date: December 14, 1973

Place: Washington, D. C.

Alderson Reporting Company, Inc.

300 Seventh St., S. W. Washington, D. C.

NA 8-2345

C O N T E N T S

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
Albert Brick	3	99	104	

DEFENDANT EXHIBITS:	FOR IDENTIFICATION	IN EVIDENCE
1	5	
2	7	
3 & 4	10	
5 & 6	23	
7	36	
8	52	
9	53	
9-A	56	
10	58	
11 & 12	59	
13	71	
14	72	
15A thru 15E	74	
16	82	

x x x

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ALBERT BRICK,

Plaintiff;

vs. Civil Action No. 1503-73

CPC INTERNATIONAL INC.,

Defendant.

Washington, D. C.,
Friday, December 14, 1973.

Deposition of

ALBERT BRICK

the plaintiff, called for examination by counsel for the defendant, pursuant to notice, a copy of which is attached to the court copy of this deposition, in the offices of Cahill Gordon & Reindel, 1819 H Street, N.W., beginning at 10:10 a.m., before Doris Burns, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

For the Plaintiff:

SAMUEL INTRATER, ESQ.,
1025 Vermont Avenue, N.W.
Washington, D. C.

For the Defendant:

CAHILL GORDON & REINDEL
BY: DENIS McINERNEY, ESQ. and HENRY G. BISGAIER, ESQ.
1819 H Street, N. W.
Washington, D. C.

P R O C E E D I N G S

Whereupon,

XXXXXX

ALBERT BRICK

was called for examination by counsel for the defendant and, having been first duly sworn by the Notary Public, was examined and testified as follows:

XXXXXX

DIRECT EXAMINATION

By Mr. McInerney:

Q Would you please state your name and address?

A Albert Brick, 1025 Vermont Avenue, Northwest, Suite 625.

Q Is that your office address?

A Yes.

Q And your home address?

A 3616 Suitland Road, S. W., Washington, D. C.

Q What is your business or profession?

A I am an attorney.

Q You are a member of the Bar of the District of Columbia?

A Yes, I am.

Q Are you a member of any other Bar, sir?

A Well, I have been admitted years ago, and I haven't used it in the District Courts of Maryland, and even I believe Virginia, but I am actually only a member of the District of Columbia Bar.

Q What is the name of your law firm?

A Brick and Intrater.

Q And the address of that firm is the address you have just given?

A That is correct.

Q How long have you been a member of that firm?

A Well, I would have to guess. Eighteen or 20 years. Mr. Intrater formed a partnership with me. Prior to that time, I started to practice law in the District of Columbia in the spring of 1935 and have done that continually up to the present time.

Q Without getting into any specifics, I take it when you talk about a law partnership that means that you have some arrangement for the sharing of fees with Mr. Intrater?

A That is correct.

Q Are there other partners or associates in the law firm of Brick and Intrater?

A None that are partners. We have another man in there who rents space from us.

Q And your firm is registered in the legal register for the District of Columbia; is that correct?

A I don't know what the legal regist r of the District of Columbia is, but is you are talking about a little book ---

Q Martindale-Hubbel?

A We don't subscribe to it anymore. We did for a lot of years.

Q Are you a member of any other law firm or associate group of la yers?

A No, I am not.

MR. McINERNEY: Would you please mark that as Defendant's Exhibit 1?

XXXXXX

(The document referred to was marked for identification as Defendant's Exhibit 1.)

By Mr. McInerney:

Q Mr. Brick, would you just identify for the record Defendant's Exhibit 1?

A This looks like the complaint that Mr. Intrater filed in my behalf.

Q And did you help him prepare it?

A No. I just told him all the facts as I knew it and the background of it, and he prepared it.

Q Did you look at a draft of it before it was filed?

A I certainly did.

Q And did you have comments to make on the draft?

A I thought it would fit the situation and told him it was okay.

Q In other words, are you saying you did not make any suggestions for revision?

A No. He drew it up and filed it. I had discussed the facts that I had or was going to rely upon fully with him and he drew it up.

Q Did you verify this complaint, Mr. Brick?

A I don't believe I did. I read it over, but as far as -- I assume you are saying did I swear to it. No, I don't think the rules call for it. At least Mr. Intrater didn't insist that I do it.

MR. McINERNEY: I will ask the reporter to mark this as Defendant's Exhibit 2 and ask you to identify it, Mr. Brick?

XXXXXX

(The document referred to was marked for identification as Defendant's Exhibit 2.)

THE WITNESS: I recall Mr. Intrater giving me that and showing it to me.

By Mr. McInerney:

Q Would you please, just for the sake of the record, Mr. Brick, tell us what that is?

A That is a notice to produce documents.

Q And you say Mr. Intrater showed it to you?

A That is right.

Q Did you have anything further to do with that notice to produce documents?

A He had me go through the file and pick out the documents that were pertinent to this, which I believe he eventually sent to you people.

Q Did you personally search for those documents?

A I personally did, yes.

Q I don't believe we need to mark the next document, but I would like to show it to you. It is a letter from you, Mr. Brick, or appears to be a copy of a letter from you, to Mr. Mulvihill, dated September 24, 1972. Would you just take a look at this, please?

A Yes, I am acquainted with that letter. I wrote it.

Q Can you tell us where Mr. Intrater was on or about the date of that letter, September 24, 1973?

A He, I think, was already on his way to Japan, or was already there. I couldn't tell you. But he was not in the office at the time I received the answer from Mr. Mulvihill and Mr. Intrater had told me that he had had some conversation with Mr. Mulvihill, and he would work out some times and so forth.

I believe I was looking for an answer and instead of an answer or with the answer we got the notice to take the deposition.

Q As best you can recall, would you tell us approximately the time period during which Mr. Intrater was away from the office and out of the country?

MR. INTRATER: I object to this. I don't see where this has anything to do with this action.

MR. McINERNEY: Just to save time, I take it when you object that you are instructing the witness not to answer?

MR. INTRATER: I have made my objection. If you will give me any basis on which you can show that there is any legitimate purpose to these questions, I will not instruct him not to answer, but I would like to know why you should be

inquiring as to where I go when I am away on vacation. I don't think it is any of your business.

MR. McINERNEY: I do not want to debate the matter with you. I think the purpose will become clear. I will just go on to save time. In other words, as it stands now, Mr. Brick is not going to answer that last question; is that correct?

MR. INTRATER: I have told you if you can give me any reason or legitimate purpose for it, I will certainly have him answer the question. I have given you the reason why I don't think it is appropriate. If you will give me any legitimate reason, good.

If you refuse to do so, I will instruct him not to answer the question.

By Mr. McInerney:

Q Mr. Brick, would you look at the lower left-hand corner of this letter and you will see there the initials A.B./I.M.S.

A A. B. is myself and I.M.S. is Irma Shober who was our secretary.

Q And what does that legend signify to you?

A Nothing, except the letter was sent on my behalf, and

she was the one that typed it.

Q Is it her practice to put the initials of the person who dictates the letter and her own initials on the letter before she sends it?

A Yes. She doesn't do it on the original, but on copies she does do it.

Q And is that her general procedure?

A Over the years, more or less. You never know. Sometimes in a rush she might not, but generally that is the way she might do it.

MR. McINERNEY: Please mark this next document, dated November 29, 1973, as Defendant's Exhibit 3, and the accompanying document submitted, "Answer to and copies of documents demanded of Plaintiff," as Defendant's Exhibit 4.

XXXXXX

(The documents referred to were marked for identification as Defendant's Exhibits 3 and 4.)

By Mr. McInerney:

Q Would you please identify Defendant's Exhibits 3 and 4, Mr. Brick?

A Right.

Q Would you tell us what they are?

A One is an answer to the copies of documents demanded of the Plaintiff, and the other is an accompanying letter.

Q The accompanying letter is the document that is being marked Defendant's Exhibit 3; is that correct?

A Right.

Q And that is a letter from the firm of Brick and Intrater to Mr. Mulvihill of this office; is that correct?

A Right.

Q Would you look at the lower left-hand corner of that letter, Mr. Brick?

A Right.

Q I notice that the same legend appears, "A.B./I.M.S."

A I notice it too.

Q Does that indicate that you prepared this letter?

A Not necessarily. Errors happen in a busy office like ours, and I am certain I did not prepare that letter.

Q Why are you certain?

A Well, I haven't prepared anything in connection with this case since the case started.

Q You have not?

A No, I have not. I am a litigant. Just like I told

Mr. Mulvihill in that letter of September 24, I don't want any contact with anybody in this case. The contact is going to have to be with Mr. Intrater. He is the attorney in the case.

Q Are you telling us that you have not done any legal work in connection with this case?

A I did before we filed suit. I looked up one proposition, but I have done no legal work in connection with this.

Q That includes the drafting of papers?

A That is correct.

Q And the sending out of paper ?

A That is correct.

Q And investigation of the facts?

A Well, that is correct, because I haven't started to investigate the facts yet.

MR. INTRATER: You did go over to the SEC.

THE WITNESS: I am sorry. I have been over to the SEC. If you call that law work or investigating, yes, I have done that.

By Mr. McInerney:

Q Well, what else have you done in connection with the case?

A Oh, I have received phone calls from people from time to time, but other than that, nothing.

Q What sort of phone calls?

A Well, there was a fellow who called me one time and told me that he had tried to get his attorneys to file suit on this and we'd beaten him to the punch.

Q Who was that?

A A fellow I believe by the name of Desser in Baltimore.

Q And who is Mr. Desser?

A He is a real estate man who I have talked to on occasion, but know very slightly.

Q And what is or was his interest in the case?

A Well, he owns some Funk stock and he is very unhappy.

Q Would you give us the substance of the conversation?

A I have just about given it to you, and he was thinking about maybe joining in the suit, but he hasn't written me or anything since he talked to me about it.

Q Is that the only conversation?

A I think I had two conversations with him.

Q And the conversation you have just described, was that the first or the second?

A Well, I think the first conversation was that he told me that he was disappointed his attorneys hadn't filed suit and didn't know why they didn't. He wanted them to and didn't know why they didn't, but I beat them to the punch.

The next time I talked to him about this, he said, well, he would consider joining in the action with me, but he has never written me or anything. He knows where I am at.

Q Now, the first conversation I think you told us originated with him. How did the second conversation originate?

A I called him.

Q Why?

A I wanted to find out whether he was going to do anything about it. He sounded when he talked to me like he might want to be joining us.

Q I am not sure I understand the purpose of your call. What did you want him to do about it?

A I wanted to find out if he wanted to join us. That is or was the purpose of my call.

Q Why did you want him to join you?

A I think anybody who wants to join us who has the same sort of complaint we have, we'd be glad to have him join

us.

Q For what purpose?

A I think the more in a lawsuit like this, the better.

Q Is that all?

A That is all.

Q Would you please tell us to the best of your ability the substance of the discussion you had with him on that subject?

A Well, he told me he read about this in the Wall Street Journal and said he had been thinking of filing suit and tried to get his attorneys to do it and for some reason, they didn't.

Q What did you say to him?

A Not very much. I said at least I have got it in. I don't recall every word. At the time I didn't think it very important because of the fact that I had filed suit, but I said to him, well, if you decide you want to join in, let me know.

I never heard from him, and I called him and he said he'd be in touch with me.

Q How recently was that?

A Within the last two or three weeks.

Q And in that second conversation, would you tell us what you said to him and what he said to you as best you can?

A I asked him if he wanted to join in with us, and we'd be glad to have him join. He said he'd be in touch with me and indicated he might be willing to do it, but you know, like before, he said he'd be in touch and he wasn't. I was just finding out what his feeling was.

Q Did you have any discussion as to the terms on which he might join in the lawsuit?

A None whatsoever.

Q Can you recall anything else about that conversation?

A Nothing else that I can recall.

Q Is there anything else that you have done in connection with the lawsuit that you haven't told us about up to now?

A The only think I can think of, as I said, I went to the SEC. I have sent letters to two people in New York, three people, Forbes Magazine, and two other people, and I gave you copies. Other than that, that is about all I have done.

Q The two other people were the Gilbert Brothers, were they, and ---

A Yes.

Q Who was the other gentleman?

A I don't know. You have it there in the letter.

Q Mr. John Henry, was it?

A That is correct, and I have not contacted either one of them yet.

Q I am sorry. I didn't understand your answer.

THE WITNESS: Would the reporter read it?

(The answer was read by the reporter.)

By Mr. McInerney:

Q The reason I said I didn't understand your answer is I thought you told me you had contacted them?

A No. Outside of the letters, I have not contacted them yet. I intend to at sometime when I am in New York at my convenience.

Q Apart from those letters and the SEC contact, which we'll get to presently, is there anything else that you have done in connection with preparing this complaint or preparing for the lawsuit?

A I did something to make up my mind whether I would file a lawsuit. I read an article August 1 in Forbes, and briefly checked out some law on my own as to the dividend.

After I looked up that, I decided I ought to file suit, that Forbes was on the right track.

Q Was the article in Forbes really the inspiration for this lawsuit?

A Absolutely.

Q Had you had any thought of bringing suit against CPC prior to reading that article?

A No, I had not.

Q And subsequent to reading that, you looked up some law?

A Yes, I did.

Q On what subject, sir?

A On the subject of the dividend, whether the corporation had the right to borrow money to pay a divident, and they didn't except in very circumscribed circumstances, and I realized Forbes was probably correct in what happened in this instance.

Q Did you do any other investigation in fact or law in preparation for this lawsuit?

A No, I didn't.

Q And subsequent to the filing of the complaint, have you done any further investigation of fact or law other than

what you have already testified to?

A I don't believe I have. As I said, I went down to the SEC and looked at whatever records they would show me.

Q What were those records?

A They have got all kinds of records down there. They wouldn't show me everything because I was trying to get from them their records on their investigation of this situation, but whatever they did show you in the file room down there, like the -- what do they call the file down there?

MR. INTRATER: Registration certificate.

THE WITNESS: Yes, and the documents that went with that.

By Mr. McInerney:

Q Did you make copies of that?

A No. The only thing I made a real note on was corporate bylaws dealing with dividend and discovered when they declared dividends, the next section required that they set aside a reserve for certain contingencies and conditions.

Q And those are the bylaws of which company, Funk or CPC?

A Of Funk.

Q Do you still have that note that you made?

A I could probably find it in my file.

Q Would you provide it to us?

A No. I will be glad to give it to you some other time, but I don't think I should go through my file now. You are taking my deposition. I will be glad to furnish it later.

Q But you will furnish it?

A I will be glad to furnish it.

Q Now sir, the document that has been marked Defendant's Exhibit 4, which I believe you have identified as the "Answer to and copies of documents demanded of Plaintiff."

A Right.

Q Did you have anything to do with the preparation of that document?

A I gave the information to Mr. Intrater. I went through the file and tried to follow it as best I could and turned it over to him, and he made it up.

Q Did you sign that document?

A Yes.

Q Did you read it before signing it?

A I certainly did.

Q Did you have any revision to make after you read it?

A Not that I recall.

Q Is there any prior draft of that document that you know?

A Not that I know about.

Q Do you make it a practice in your office to preserve drafts of documents, sir?

A Very seldom. We never do in pleadings like this that I know of.

MR. INTRATER: Can we go off the record?

MR. McINERNEY: Yes.

(Discussion off the record.)

MR. INTRATER: On the record.

On Defendant's Exhibit Number 4 on the left-hand side above the typed name for my signature appears my signature. That actually was affixed by a stamp. Over on the right-hand side where there is a line for Mr. Brick's signature, there appears a slant and the letter "S" and a slant. That is my writing. I placed that on there.

On the second page where there is another line for a signature of Mr. Brick, there is another slant, another letter "S," another slant. That again is my handwriting. I put that there. On the extreme bottom line where my signature

appears, that is my stamp.

I stamped that on there. Numerals 28 on the line, which was a blank line before the words, "day of November," those numerals "28" are in my own handwriting. My ordinary practice is that on original pleadings which are filed in court, I actually signed my name.

On copies that go out to counsel on the other side, I usually affix the stamp. Sometimes I also put the stamp on the original pleadings. Not usually, but sometimes I do. In letters that go out most of the time I sign my own name. Sometimes, if I am in a rush, I will have my secretary affix a stamped signature to letters that go out.

That is what I said before off the record.

By Mr. McInerney:

Q Mr. Brick, how many secretaries do you have in your office?

A One.

Q And that is the lady you identified before?

A That is right, Ms. Shober. She works from 8:30 until 3:30.

MR. McINERNEY: I will ask the reporter to mark two documents; one a letter dated September 25, 1973, and the

other a document submitted "Notice to Produce Documents" and ask you, Mr. Brick, to identify those.

XXXXXX (The documents referred to were marked for identification as Defendant's Exhibits 5 and 6.)

By Mr. McInerney:

Q Would you tell us what they are?

A These are notice to defendants to produce documents.

Q That is the one that has been marked ---

A Exhibit 6.

Q And Defendant's Exhibit 5?

A Five is a letter that I sent to Mr. Mulvihill enclosing this notice to produce documents, and again pointing out to him that when Mr. Intrater got back to the country, that he had a trial scheduled for that particular date.

Q Was Mr. Intrater out of the country at the time you wrote Defendant's Exhibit 5?

A I am positive he was.

Q And for how long was he out of the country?

A He was out of the country, as I recall, for two or three weeks. I am not certain about it. I am sure he would

know and my secretary would know.

Q Now, if you would look at page 4 of Defendant's Exhibit 6, you will see what appears to be the signature of Mr. Intrater.

A Correct.

Q Is that actually the stamp?

A That is the stamp.

Q That is the stamp to which Mr. Intrater referred previously?

A Right.

Q And did you or your secretary, Miss Shober, affix the stamped signature to that document?

A I am sure she did. I never use the stamp.

Q You never ---

A On rare occasions. I will take it back. If it is something that has to go out when he is in court -- and I might explain this in the way of telling you what type of an office we run. I seldom go to court anymore. I am over the hill on court work, and sometimes he is real hard to come by. So, when his work piles up, or if he is out of town and dictated some work before he leaves town, but dictated some work, the secretary will affix his signature to it.

Frankly, I can't recall the occasion, but maybe in the last two or three years, if that many, I have affixed his signature with this on something.

Q Now, was this notice to produce documents one of those occasions in which either you or your secretary used the stamp since Mr. Intrater was not available?

A Correct.

Q Did you send this notice to produce documents, Defendant's Exhbit 6, with your letter to Mr. Mulvihill, Defendant's Exhibit 5, on or about September 25, 1973?

A I did.

Q On that occasion you wrote to Mr. Mulvihill. "Dear Mr. Mulvihill: Enclosed please find a notice to produce documents. I have used the same date, October 25, 1973, as you had in your notice," etc.

Now, my question, Mr. Brick, is whether you prepared Defendant's Exhibit 6?

A No, I did not. I discussed it with Mr. Intrater of course. Naturally we had talked about it over a period of time and were going to, at the time he got the answer -- you realize that we can't file notice to produce documents until an answer is filed in the case, and you had not filed an answer,

and when the answer was filed, it was then that this was out, and as I recall, the date was probably blank in there, and I took the privilege of putting the date in there to coincide with the date Mr. Mulvihill sent us on his notice to produce documents.

Q What, if anything, did you have to do with the drafting of the notice to produce?

A I discussed it ---

MR. INTRATER: I object to this question and anything further with regard to this. I would like to understand what is the purpose. We have spent approximately 45 minutes now just discussing the pleadings in this case.

What possible purpose with regard to discovery does this discussion of the pleadings, the preparation of the pleadings, have?

MR. McINERNEY: Mr. Intrater, I think we'll save time if you simply object, and if you wish to instruct the witness not to answer ---

MR. INTRATER: Mr. McEnerney, I am not trying to engage in any debate at all. I am perfectly willing to have Mr. Brick answer questions which are proper. I think we have wasted 45 minutes here, and I don't want to waste anymore time.

If you can give me any reason why these questions with regard to the preparation of these pleadings are in any way a proper basis for discovery or will lead to anything that is a proper objective of discovery, I will be willing to say, "Go ahead and answer them."

I am trying to find out what possible reason there is for spending all this time on this, and I don't see why you should be so secretive about this.

MR. McINERNEY: My only reason at the moment is that I think it would save time if you would let the witness answer the question. He was in the middle of an answer when you voiced an objection.

MR. INTRATER: I say that we have already spent 45 minutes discussing the pleadings in this case, and I really don't want to waste anymore time on that. I mean that I have better things to do with my time than sit here discussing things that are no legitimate objective of a deposition.

MR. McINERNEY: Obviously I don't agree with you. I wouldn't be asking ---

MR. INTRATER: I am asking you to disclose your reason because if you refuse to disclose it, I can only assume you have no legitimate purpose, and I don't want to waste any

more time on this.

MR. McINERNEY: I thought it was obvious from my previous questions that I am interested, among other things, in the extent to which Mr. Brick has participated in the preparation of these legal documents.

MR. INTRATER: I know you are interested in that. I am asking to what purpose. What does that have to do with the issues in this case? How will that lead to any legitimate objective of discovery?

end oep
emcg fls.

emcg

fols
oep

Depos.

A.Brick

MR. McINERNEY: I think it has to do with the status of Mr. Brick, whether he is acting in this case as a plaintiff or as plaintiff and counsel, or in what capacity he is acting.

MR. INTRATER: Well, I will allow him to answer this question, but I think we have spent enough time on this and I am not going to allow this to go more than another five or ten minutes with regard to this. I have just got too many other things to do.

MR. McINERNEY: Well, I suggest we'll get through it a lot more quickly if you let him answer.

MR. INTRATER: Do you want to go ahead? Do you want to have the reporter repeat the question?

THE WITNESS: I think.

(The pending question was read by the reporter.)

THE WITNESS: I discussed it with Mr. Intrater and he gave me his ideas and I gave him my ideas what he ought to ask for. I don't recall the exact words that were spoken either way, and he prepared them.

By Mr. McInerney:

Q He prepared Defendant's Exhibit 6?

A That is correct.

Q Did you have any suggestions on the draft that he

g2 prepared?

A No. He was taking notes. When I got through, that was it. I looked it over. It looked all right to me and it went out.

Q Is this notice to produce documents in substance the documentary demand that you had suggested to Mr. Intrater?

A Part of it was and part were things that he put in. After all, he is my lawyer and I am acting as a client. I have a right to discuss these things with him and I do. I have talked to him at great length about many phases of this case.

Q He is also your law partner, is he not?

A I have already testified to that.

Q Now, when you wrote Defendant's Exhibit 5 and participated in the drafting of Defendant's Exhibit 6, were you acting as a party or as counsel, or both?

A Only as the plaintiff in the case. After all, as a lawyer, when we have to get information and decide what we want to get in the case and so forth, we talk to our clients, and that is what Mr. Intrater did to me. He talked to me like any other client to get the information and discuss it with the client. We do that very frequently.

Q Do your clients frequently send out your notices to produce documents?

A No.

Q Isn't that a ---

A He was out of the country and I let the thing go.

Q When you sent Defendant's Exhibit 5, were you acting as a lawyer?

A No, I wasn't. Basically I was just moving the case ahead in the sense that he was out of the country and, like I do in other things, if you want to say I was acting as a lawyer in sending that out, fine. That can be your implication. But as I had written I didn't want to discuss the case or have anything to do with Mr. Mulvihill, but all I did was send this out and give him the reason why I put that date in there.

Q What was the reason?

A Well, the reason was that I think in his notice to produce he had a date, either that date or a date very close to it -- yes, he had the same date in his notice to produce.

Q And you used the same date in sending this notice out?

A That is correct.

Q Had you planned to send this out on September 25 and have the notice to produce returnable on October 25 prior to the receipt of the Defendant's notice to produce documents?

A Yes. I think this had been prepared a considerable length of time before. We were waiting for an answer to come in and I think the notice to produce came in at the same time the answer came in, so we were in a position to demand documents from you people under the Federal Rules.

Q In framing your notice to produce documents, did you have reference to the Defendant's notice to produce documents?

A Yes.

Q And did you use that in part in drafting language such as the word "document" in Defendant's Exhibit 6?

A The word "document," yes. The secretary used the same form as that.

Q In other words, she copied more or less the definition of the word "document" that we, the Defendant, had used in drafting our notice to produce?

A Right.

Q Now, when did you receive the Defendant's notice to produce documents?

A Oh, I would imagine we received it -- I really

couldn't tell. A day or two before that, I would imagine.

Q Would it refresh your recollection to look at Defendant's notice to produce documents, which I believe has already been marked as ---

A I know this is dated September 20. Sometime between September 20 and September 25.

Q Would you look at the upper right-hand corner of the first page and notice the stamp on that?

A September 24.

Q Mr. Intrater was out of the country on this date, was he not?

A Yes.

Q So that when you received Defendant's notice to produce documents Mr. Intrater was not around and you had to draft this yourself?

MR. INTRATER: That is not true.

MR. McINERNEY: Now just a minute, Mr. Intrater. May I caution you that you are not here to testify.

MR. INTRATER: I am here to act as an attorney. Are you saying I can't correct something you have stated?

MR. McINERNEY: You cannot testify or tell Mr. Brick you are unhappy with his testimony.

MR. INTRATER: He hasn't even said anything yet. I am just saying I don't know when this was received but the fact that this was originally filed with the U. S. District Court does not necessarily mean that is the date it was received in our office. This is all I am saying.

MR. McINERNEY: You don't know when it was received, do you, Mr. Intrater?

MR. INTRATER: No, I don't.

MR. McINERNEY: Because you were out of the country at that time; is that correct?

MR. INTRATER: I am just saying that the date of September 25 does not reflect necessarily the date it was received in our office.

MR. McINERNEY: I think we already have Mr. Brick's testimony that you were out of the country at the time this was received.

MR. INTRATER: That is correct. That is correct. I am not saying that is not so. I am just saying you refer to this date of September 24 that was stamped on there by the Clerk of the Court, and you indicated in your next question that was when it was received in our office.

All I say is that the date that it was filed in the

U. S. District Court does not necessarily mean that is the date it was received in our office.

MR. McINERNEY: I think you have made your point, Mr. Intrater.

THE WITNESS: I would like to say this: Come to think of this, I think I prepared this thing basically in toto, even though I had discussed it with Mr. Intrater previously.

By Mr. McInerney:

Q That is Defendant's Exhibit 6?

A Yes.

Q And in preparing it you had reference to the notice---

A Notice that I had received.

Q -- that you had received.

A I am positive of that now that I look it over and refresh my recollection, and I did it because I wanted this to move along and Mr. Intrater was not available.

Q When you did that, sir, you were acting as a lawyer, weren't you?

A Yes, I was on that particular instance. In a two-man firm I might say it is pretty hard to distingui h between one and the other, but since then I have tried to stay out of this case completely and act just as a plaintiff, which is

difficult to do but I think I am doing it.

MR. McINERNEY: Would you mark this next document as Defendant's Exhibit 7, please.

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(The document referred to was marked for identification as Defendant's Exhibit 7.)

THE WITNESS: I have read it.

By Mr. McInerney:

Q Now please describe Defendant's Exhibit 7 for us.

A It speaks for itself. It is a letter I sent to Delmar Walker, President of Funk's International.

Q What was the purpose of that letter?

A To get his cooperation as a stockholder.

Q As a stockholder?

A Absolutely. You may say it is a legal letter, but I think I have a right to write to the president of a company that I own stock in, a publicly-held company.

Q Well, in what were you seeking his cooperation?

A I want some of the facts of this case that he knows about. The letter speaks for itself.

Q You were seeking what we lawyers call discovery; is that correct?

A That is correct. I think a stockholder has a right to ask officers of the corporation these questions that I have in here.

Q Did you discuss this letter with Mr. Intrater before you sent it out?

A Yes, I did. And I felt it better come from me as a stockholder than from me as a lawyer.

Q What letterhead did you use in sending that letter?

A I don't recall. My secretary sometimes uses "Albert Brick." Sometimes she uses "Brick and Intrater."

Q When she uses "Albert Brick" the letterhead is "Albert Brick, Counselor at Law," is it not?

A Yes, it is.

Q You don't recall which one she used?

A No.

Q Do you make any conscious decision as to which one she uses?

A No. We leave it up to her.

Q In this case ---

A We don't run that kind of an office.

Q It is a matter of chance, would you say?

A Absolutely.

Q And this might have been written on the letterhead of "Brick and Intrater"?

A Could have been.

Q When you wrote that letter to Mr. Walker dated October 11, 1973, you were again furthering the law suit by seeking discovery; is that correct?

A Absolutely. As a plaintiff I think I have a right to further the lawsuit. I don't think I should go in a corner and be quiet like you seem to imply in your questions.

Q Would you say that you were also acting, in addition to being the plaintiff, as attorney?

A Not necessarily in this letter to Mr. Walker because I think a stockholder has a right to go ahead and get information from a corporation, a president of a corporation, that an attorney for a stockholder might have difficulty in getting, but don't forget, there is a very slim line of demarcation between being a lawyer and being a party to the suit.

Because I am a lawyer I can't deny that anything I do you can say, well, he is doing it as a lawyer. You can infer that, but actually my purpose in writing that letter was as a stockholder. But having legal knowledge, the letter might sound like a letter that a lawyer might send for a client.

Q Is there any reason why you feel inhibited in acting as a lawyer in this case?

A Well, I have always been told that lawyers in their own litigation act as fools, and I am not going to be the lawyer in the case anyway. To begin with, I filed this suit as a plaintiff, as a private stockholder of Funk Seeds, and the fact that I am a lawyer incidentally puts me in the spot I suppose of any lawyer who files a suit on behalf of himself could be accused of the same thing. I am suing as a stockholder.

Q What is the thing you referred to when you say "be accused of the same thing"?

A Well, I mean if you are a lawyer and you file suit against someone, even if you have another lawyer handling the case and you are in his office, it is very easy to infer that I am acting both as a lawyer and stockholder, but I am actually acting as a plaintiff and stockholder.

Q Do you see any inconsistency acting as a lawyer and stockholder?

A No, I don't. That is why Mr. Intrater is handling this case. If I wanted to be both, I would have signed the pleas myself and carried on everything myself.

Q Isn't it the law firm of Brick and Intrater that is representing you?

A Yes, it is, but Mr. Intrater is the one who is handling this case.

Q Now, referring back to Defendant's Exhibits 3 and 4 ---

MR. INTRATER: As a matter of fact, I would like to point out that all these pleadings, unless something slipped by by error, all the pleadings that we have filed in this case indicate that I was the attorney for the plaintiff, Samuel Intrater, not the firm of Brick and Intrater.

MR. McINERNEY: I am not sure that is accurate. May I refer you, for example, to the exhibit we were just going to discuss, Exhibits 3 and 4, which is a letter signed by you on the stationery of Brick and Intrater.

MR. INTRATER: I think if you will review in your mind what I have just said, you will appreciate that I said unless something slipped by, all the pleadings that I have filed in this case have been signed by me, Samuel Intrater, and they have not been signed as the law firm of Brick and Intrater. That is all I said.

MR. McINERNEY: Are you saying, Mr. Intrater, that Mr. Brick is inaccurate when he tells us that Brick and

Intrater is representing him?

MR. INTRATER: That is correct.

q MR. McINERNEY: What is correct?

MR. INTRATER: What you just said.

MR. McINERNEY: That Mr. Brick is not giving us an ---

MR. INTRATER: That he is inaccurate in saying that the law firm of Brick and Intrater is representing him. Who represents him in this case is Samuel Intrater. I am representing him in this case and I have filed, as I said, unless something slipped by, I have filed all the pleadings in the name of Samuel Intrater.

Ordinarily, signatures to pleadings are in the name of Brick and Intrater, but I have specifically signed these pleadings as Samuel Intrater. I am his attorney in this case.

MR. McINERNEY: Mr. Intrater, it may become necessary in this case to take your deposition, but until that time I'd like to ask you to confine yourself to objections and answers to questions that I might put. I don't think it is appropriate for you to suggest any answers to Mr. Brick, but I will now ask Mr. Brick if he adopts what Mr. Intrater has said.

THE WITNESS: Absolutely.

MR. INTRATER: In the first place, I was answering

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a question you just posed to me; and secondly, I don't intend to sit here and allow you to lecture me. I will conduct myself in this hearing any way I see fit. Don't you try to teach me how to practice law.

MR. McINERNEY: I think you know as an experienced practitioner, Mr. Intrater, that there are certain boundaries with respect to what one does on a deposition even though there is no judge present here.

MR. INTRATER: I have no intention of allowing you to teach me how to practice law. We have wasted enough time on this gobbledygook. This has nothing to do with the issues of the case.

By Mr. McInerney:

Q Mr. Brick, referring back to Defendant's Exhibit 3, to which I was referring just previously before Mr. Intrater's statement, did Mr. Intrater sign Defendant's Exhibit 3?

A Absolutely. I guess. I didn't sign it. It looks like his signature.

Q And that is on the stationery of Brick and Intrater?

A Correct.

Q And enclosed with that is the Exhibit 4 that we referred to previously, the answer to and copies of documents

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demanded of plaintiff?

A Right.

Q And I believe you told us that you gave the information on the basis of which that was prepared; is that correct?

A That is correct.

Q Would you look at Item 2 of that exhibit, and to put it in context I would like to refer you back to Defendant's Exhibit 2, which is Defendant's Notice to Produce Documents, which asks ---

A I don't understand what you are talking about. If you are asking me about No. 2, ask me.

Q Well, I want to point out to you that your answer No. 2 in Exhibit 4 is in response to the demand, which is Exhibit 2. Item 2 of that demand, which requests any documents relating to "attorney's fees, disbursements or other expenses in this action (including but not limited to your retainer of counsel for plaintiff in this action)."

A Right.

Q Now you answered that in Item 2 of Exhibit 4: "Court costs, $10.00; U. S. Marshal, $3.00."

A Yes, I did.

Q Now ---

A What is your question? Why are you taking so long to ask me the question?

Q I didn't think you understood what I was getting at.

A Well, you ask me a question, and I see it.

Q Is there any document relating to your arrangement with Mr. Intrater or the law firm of Brick and Intrater ---

A None whatsoever.

Q -- with respect to this case?

A That is correct.

Q Who paid the Court costs of $10 and the Marshal's fee of $3?

A It came out of the law firm funds.

Q Was it paid by check?

A Check.

Q What is the arrangement that you have with respect to disbursements in this action?

A None whatsoever.

Q Well, I believe you told us it came out of the law firm's funds.

A These two items came out of the law firm's funds.

Q And that was not pursuant to any understanding with Mr. Intrater?

A No, no understanding whatsoever.

Q What understanding do you have with respect to any attorney's fee that may be collected?

A I just told you, none.

Q If the firm of Brick and Intrater should recover any attorney's fee in this action you will share in that, will you not?

A I don't know what the situation will be.

Q You are a partner in the firm?

A I am a partner, but I don't know what the Court might decide as to that. If the Court decides that I am not to share any fee as an attorney, that will be it.

Q But if the Court permits you to, you will?

A Absolutely.

Q And in accordance with your normal percentage share of the partnership -- I am not asking you what that is; is that correct?

A That is correct.

Q So that to the best of your ability you will attempt to recover a fee in this case as class representative or as a derivative suitor and share in that fee?

A I am not in a position to say at this time if your

statement is correct. It may well be that whatever fee is paid will be paid directly and solely to Mr. Intrater.

Q But to the best of your ability you do want to share in that fee?

A I would like to.

Q Do you see any reason why you shouldn't share in that fee?

A I don't know. I think it is up to the Court. The Court will have to settle that situation.

Q Have you ever acted in this capacity before as a representative of a class or purported representative of a class?

A I don't believe I have in a case like this. I don't recall ever filing a suit based upon being a stockholder in a company.

Q Well, I was going to ask you that as well. You have never brought a derivative action before?

A I can't recall. You know, I have practiced law since 1935 and I don't recall at the present time of ever bringing a suit like this.

Q And is your answer the same with respect to volunteering to represent a class?

A Well, again, I will put it this way: I don't recall ever representing a class in a stockholder's suit, no, I don't recall it.

Q Well, in any other kind of suit?

A Well, I am limiting myself. It may have been over the years I have represented more than one class of people in some other type of action.

Q Can you tell us whether you did or not?

A I can't recall.

Q I believe that your documentary demand would cover the check or checks used to pay the Court costs of $10 and the Marshal fee of $3; but whether it does or not, we would request that check or those checks at this time.

A I don't have them with me and you will have to make the request.

Q Well, I have made the request. Will you produce them?

A That depends upon what Mr. Intrater wants to do.

MR. McINERNEY: Mr. Intrater, will you produce those?

MR. INTRATER: If you can give me a good reason why I should, maybe I will.

Do you want to continue with the deposition?

MR. McINERNEY: Well, the reason is that I think, first of all, our documentary demand requesting documents referring or relating to disbursements covers those checks. Your answer to that demand, without any reservation, I thought, gave us everything that we were entitled to.

MR. INTRATER: Do you want to continue with the deposition?

MR. McINERNEY: Well, you asked for a reason.

MR. INTRATER: Well, I would like you to put it in writing.

Do you want to continue with the deposition? I have wasted enough time here. It's been an hour and a half in which apparently you are trying to attack whether or not Mr. Brick is going to get a fee in this case. Now, I frankly don't see where that is any of your business.

At a proper time I shall, if we prevail in this case, I shall petition the Court for a fee. If the Court -- if I at that time feel that perhaps Mr. Brick should share in that fee, that will be made known to the Court. If the Court awards me a fee, or if it says Mr. Brick should share in that fee, I don't see where that is any of your business whatsoever.

As far as any fees out of this thing, you have no say-so who gets a fee in this case. The Court does, and under those circumstances I really don't see why we are wasting all this time on this.

MR. McINERNEY: I think we will leave the relevance of these questions to the Court, Mr. Intrater.

MR. INTRATER: I said I don't want to waste any more time, so why don't you continue with the deposition?

MR. McINERNEY: Well, I have a number of questions about this and I would like to return to Mr. Brick's testimony and ask him to what extent, if any, there is any understanding that he will not share in any fee that may be recovered by Mr. Intrater or Brick and Intrater.

THE WITNESS: For the last time, I will testify I have no understanding with him whatsoever. We have never discussed it.

By Mr. McInerney:

Q You have never discussed the subject of what might happen to the attorney's fee that might result from this?

A No, we have not.

Q Can you give us in substance, to the best that you can recall, what, if anything, your understanding with

Mr. Intrater is with respect to the whole conduct of this litigation? Did you discuss it with him previously?

A Yes, I did.

Q And what was the substance of that discussion?

A That he was going to handle all the legal work and I would do what I could to help him get the facts together.

Q Is it your testimony there was no discussion at all with respect to any fee?

A Absolutely not, and I think I have answered that now about five times on the record and I don't think you should ask me any further. There was no discussion as to what was going to happen to the fee. I happen to know ---

MR. INTRATER: I don't want any further discussion on this thing. I will now state as if I were under oath that there has been no discussion between Mr. Brick and myself with regard to a fee or how a fee would be handled in this case. That has been answered any number of times and I am instructing him not to answer it again.

By Mr. McInerney:

Q When there is no discussion with respect to the fee in your law firm, Mr. Brick, the fee is shared, is it not?

MR. INTRATER: Don't answer that.

I would like the reporter to note for the record the time is now 11:35. We have gone at this since 10:15 and all the discussion has apparently directed some inquiry as to whether Mr. Brick is going to get a fee in this case.

By Mr. McInerney:

Q Referring you back to what has been marked Defendant's Exhibit 7, Mr. Brick, the next-to-the-last sentence in that exhibit states -- you are writing, of course, to Mr. Delmar Walker on December 1, 1973, and you state: "Of course, there are many other questions that I will need information on as this suit progresses to trial."

Now, is it the general division of responsibility between you and Mr. Intrater that you will be the fact man and he will be the law man on this case?

A Well, whatever facts I can get for him I am going to get for him, yes. I think that is probably a fair statement. I am the plaintiff in this.

Q What questions did you have in mind?

A Well, one I have in mind is the timing of this sale of stock to the public.

Q By the timing, you mean how the timing was decided?

A Yes.

Q When did you purchase your stock?

A I believe in February of 1973.

Q Which was long after the public offering; is that correct?

A Right. Months after. I don't know how long it was. The public offering I believe was late in the summer, and I bought it in February.

MR. McINERNEY: Please mark that, Miss Reporter, as Defendant's Exhibit 8 and show it to Mr. Brick. And I will ask Mr. Brick to please identify it for the record.

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(The document referred to was marked for identification as Defendant's Exhibit 8.)

THE WITNESS: Yes, sir.

By Mr. McInerney:

Q Would you describe that, please.

A Well, the letter speaks for itself. November 2,'73. Mr. Walker had suggested that I write to Mr. King. It doesn't show on here. It doesn't show it is King on there. I am assuming that is right. This exhibit does not show King. Will you look at it and tell me if the name King is on there?

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ends

Q I believe it is, Mr. Brick, but you wrote the letter.

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fols

m3-1
fols
Emcg

Can you tell me if you wrote to any other attorney in Lord, Bissell and Brook?

A No, I don't believe so.

Q Why did you write that letter?

A Well, as a stockholder, I would like to get the facts. You are refusing to give me the information, and I want this information. I believe this will help our lawsuit.

MR. McINERNEY: Would you mark this next document, which is dated September 5, 1973, and appears to be a copy of a letter from Mr. Brick to a Mr. Forbes as Defendant's Exhibit 9.

(The document referred to was marked for identification as Defendant's Exhibit 9.)

XXXXXXXX

THE WITNESS: Okay.

By Mr. McInerney:

Q Would you describe that for the record, please?

A It is a letter dated September 5, 1973.

Q From you to Mr. Forbes, President?

A Malcolm S. Forbes, yes.

Q Who is Mr. Forbes?

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A I think he is the editor and owner of Forbes Magazine.

Q You wrote , "I am an attorney in Washington, D.C. and recently I filed suit against CPC International and was actually inspired by an article that appeared in your magazine on page 18, in the August 1, 1973 issue"?

Can you tell us when you read that?

A I could not. Whenever I got it. It could have been before or after August 1. it wasn't very long either way.

Q I believe you previously testified that this article actually did inspire this lawsuit; is that correct?

A That is correct.

Q And that previous to reading that article you had no idea of bringing a lawsuit against CPC?

A That is correct.

Q And immediately after reading the article, or shortly thereafter, you did tell Mr. Intrater about this and participated with him in the drafting of the complaint?

A Well, I participated in the sense that I told him all that I knew and what I felt about it, yes.

Q And read the complaint before it was filed?

A Right.

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Q And gave him comments with respect to it?

A Right.

Q Is there a previous draft of the complaint?

A I don't believe so. And in our office we don't keep previous drafts. Even if we have them we throw them away. We only keep the final product of our work. As I general proposition, I don't recall ever keeping drafts.

Q Now, in that letter you tell Mr. Forbes the civil action number of this lawsuit. Is there any particular reason why you did this?

A Yes. So that he would know that there was a case pending. If you say you have filed a suit, he might not believe it and if he were going to let me talk to the people who prepared the article they would certainly like to know where the suit was and probably read it before they talked to me.

Q What resulted from this inquiry of Mr. Forbes?

A I think you have a letter there from somebody in his organization stating that they didn't like to discuss litigated matters, or words to that effect.

MR. McINERNEY: Would you mark that as Defendant's Exhibit 9-A.

ms-4

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(The document referred to was marked for identification as Defendant's Exhibit 9-A.)

By Mr. McInerney:

Q Is that the response to which you refer, Mr. Brick?

A That is correct.

Q Can you tell us approximately how long after you read the Forbes Magazine article you filed your complaint?

A No, I can't. I don't remember. We could get that information for you, I am pretty sure. We would be glad to give it to you. It wasn't too long after I read it.

Q Well, actually I think the record will show that the date of your complaint is a day or two before August 1, 1973, but I don't mean to imply there is any inconsistency in that.

A August 1.

Q Before August 1, 1973. Your letter states that the Forbes Magazine article was dated August 1, 1973.

A It is the August 1 issue. I don't know if it comes out two weeks before or when it comes out.

Q But it does come out previous to the date that it bears?

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A I believe so.

Q And that is customary, is it not?

A I believe so. It wasn't very long after I read that article and made up my mind to file suit.

Q Did you conduct any other investigation from the time that you read the article and you filed a suit, and if so, what was it?

A No. The only investigation I conducted, I looked up the question of borrowing money to pay dividends and I was satisfied they were right on that proposition and they were probably right on everything else they had in the article.

Q Am I correct, then, when your complaint alleges various matters on information and belief, that the only basis for that information and belief is this Forbes Magazine article?

A Basically, yes.

Q You say basically. Do you mean to qualify that in any way?

A I qualify it because since filing the suit and going down to the SEC I find that Funk, which was owned 100 percent by BICC, or whatever their name is, CPC International, Inc., even violated its own bylaws in declaring that dividend.

Q My question was directed to previous to filing the

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complaint.

A No. Previous to filing the complaint you are correct. Basically was the fact that I had realized that that dividend, in my opinion, was illegal or improper.

Q So the complaint was filed solely on the basis of the article and your legal research?

A Right.

Q Now, sir, after receipt of that response from Forbes, the response to which you refer is marked Exhibit 9-A, did you have any further communication with Forbes Magazine since?

A None whatsoever.

Q Is it fair to say they gave you no further information than appears in the article?

A That is correct.

MR. McINERNEY: Please mark that as Defendant's Exhibit 10 for identification.

(The document referred to was marked for identification as Defendant's Exhibit 10.)

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MR. McINERNEY: In order to save time, perhaps while you are reading that, the reporter would mark the next two

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exhibits as 11 and 12.

(The documents referred to were marked for identification as Defendant's Exhibits 11 and 12.)

By Mr. McInerney:

Q Please tell us what Defendant's Exhibit 10 is.

A A letter to Mert Goldman, Securities and Exchange Commission, September 1973.

Q From Mr. Intrater?

A Yes.

Q Did you write that?

A Yes, he wrote that.

Q Did he discuss it with you before it went out?

A As a matter of fact, I discussed it with him. Mert Goldman had called me on the phone and asked for a copy of the pleadings and I told Mr. Intrater about it.

Q When did Mr. Goldman call you?

A It could have been the same day or the day before. I don't have any record of it.

Q Had you known him prior to his telephone call to you?

A No.

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Q What was the substance of that conversation?

A Well, the substance of the conversation was he wanted a copy of the pleadings and I got talking to him and he said that they had made some investigation and had not done anything about it and he wanted a copy of the pleadings in the case, so that when I told Mr. Intrater about it, Mr. Intrater dictated this letter to him.

Q Did he tell you why he wanted a copy of the pleadings?

A No.

Q Is that the whole of the conversation, as you recall it?

A Basically as I recall it, that is the conversation.

Q Now, in this letter Mr. Intrater uses the plural, "I enclose herewith a copy of our pleadings," and "We have been contacted by attorneys for the Defendant and they have requested us ...."

A Where are you reading from?

Q I am reading from the letter dated September ---

A Oh, I see.

Q Have you found that?

A Yes.

Q Do you know why he used the plural?

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A No reason.

MR. INTRATER: It is not the plural. It is the editorial "we".

MR. McINERNEY: Editorial?

MR. INTRATER: The regal "we". I can give you any number of copies of letters where I sometimes say "I", I sometimes say "we". That is my style of writing.

By Mr. McInerney:

Q Was this written on the stationery of Brick and Intrater?

A I couldn't tell you. As I say, my secretary uses her own discretion out there and this is the first time in all the years I have practiced law that that has ever come in question.

Q Would you look at the document that has been marked Defendant's Exhibit 11, which appears to be a letter from you to Mr. Belkin dated September 20. Did you actually send that letter?

A I certainly did.

Q Was there any contact between you or your office and the SEC between the September 7 letter, which has been marked Exhibit 10, and this letter, which is marked Exhibit

11 and dated September 20, 1970?

A I think I called Mr. Goldman up on one occasion and he suggested I send a letter to Mr. Belkin when I pressed him for this information.

Q What was the purpose of your call to Mr. Belkin?

A To try to get the information that they had amassed in their investigation of this sale of stock to the public by CPC and Funk Seeds.

Q Did anything else occur in the course of that conversation that you can now recall?

A Nothing except he told me that it wasn't available to me and he didn't have the authority, and he gave me the name of his boss, Mr. Belkin, and suggested that if I wanted to pursue it to write to Belkin.

Q And you did that in your letter of September 20?

A Right.

Q That letter states in part, "At the request of your Merton Goldman we sent a copy of the pleading to your office on September 7, 1973."

A Yes.

Q And that is a reference to Mr. Intrater's letter and you were using the editorial "we" or the regal "we"

at that time?

A Right. It was the truth, because I signed this letter and he sent it, so it is a "we". I am not so sure that was editorial.

Q The "we" refers to the law firm of Brick and Intrater, does it not?

A Yes.

Q Was this written on Brick and Intrater stationery?

A I wouldn't know unless I saw the original. I again repeat, we never pay any particular significance to what stationery it is written on except in one case. I am not a member of the Maryland Bar, and Mr. Intrater does a lot of practice in Maryland. When we send a letter on anything concerning a Maryland case at least the secretary has notice it is on his name alone. That is why we have these different stationeries.

Q Is that the only reason you have those different stationeries?

A Absolutely.

MR. INTRATER: Could we go off the record?

(Discussion off the record.)

MR. INTRATER: As I just said off the record, we have

12 three types of headings in our stationery. One is just "Albert Brick, Counsel or At Law" with our local address. The other is "Brick and Intrater, Counselors at Law" with our local address, and the other is "Samuel Intrater" with my Maryland address.

The usual practice in our office is that as far as my own stationery is concerned, that will be used only in cases involving Maryland cases. I then use my Maryland stationery. That is not 100 percent true. For instance, quite often when I write a letter to the editor of the newspaper I will do it on my own so I will use my own stationery, but not always.

The usual practice is that Brick and Intrater letterhead is used by me in just about everything except Maryland stuff.

Now, with regard to Mr. Brick's stationery, our secretary will ordinarily pull out either "Brick and Intrater" or "Albert Brick" letterhead for anything he dictates. Our sole real concern is with regard to Maryland stuff. She is under specific instructions to use my Maryland stationery for that. Otherwise, she will pick either "Brick and Intrater" or "Albert Brick" for letters that go out from him, and ordinarily just the "Brick and Intrater" stationery for stuff

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that goes out for me.

MR. McINERNEY: Is it fair, Mr. Intrater, that anything that bears your signature or is a file copy of a letter sent by you with respect to this case is probably on Brick and Intrater stationery?

MR. INTRATER: It probably is. Once again, I couldn't say that absolutely 100 percent, but I would say 98 percent that is probably true. I don't recall except in very ra e occasions that she would use the Albert Brick stationery for me, and that is just when we are running short of the other stationery or thatshe would use the Samuel Intrater stationery in something that doesn't have to do with Maryland.

By Mr. McInerney:

Q Mr. Brick, referring to this letter of September 20, that is where I stopped quoting before it continues, "It has come to my attention that at some stage of the game your office investigated the CPC Funk Seeds transactions."

How did that come to your attention?

A Merton Goldman told me that they had it.

Q In which conversation did he tell you that?

A I believe it was the first conversation I had with him. I think I only had two or three conversations with

him all told.

Q What did he tell you about that investigation?

A That they investigated it and they decided not to do anything about it. He wouldn't give me any of the facts.

Q Did he tell you why they decided not to give you anything about it?

A No, he didn't.

Q Did you have some conversation with Mr. Belkin prior to writing this letter?

A I never have talked to Mr. Belkin.

Q You refer in this letter toward the end of the first paragraph to "The information that I have requested." What information was that, sir?

A Well, whatever I had written in the letter to Merton Goldman, any of the facts that they had come up with.

Q You go on to point out that "I am well acquainted with the Freedom of Information Act," and "I am well acquainted with the case of M. A. Shapiro and Company versus SEC." Is that an instance where in addition to developing the facts in this case you were also acting as an attorney?

A No, I think I was pointing it out to him because what I am interested in is the facts. You could say I was

acting as an attorney but actually I wasn't. I was trying to get these facts from him, and I think as a plaintiff, I have a right even though I am an attorney, to try to develop the facts in this case in spite of the aspirations you have been casting, and I hope to continue to be active in developing the facts in this case.

Q Do you keep track of the time you spend developing the facts in this case, sir?

A No, I don't.

Q Do you keep a diary?

A No, I don't. We never have. We don't practice law that way.

Q Do you have a calendar pad on which you note things like conversations?

A No. We keep no records of telephone calls. I have a pad on which I have appointments. We usually throw those away after a very short period of time. We run a two-man office. We don't have all the help that you have around here. We have one secretary, and we are very busy and we have been doing that for years.

Q Did you look at your appointment book when you were searching for the documents requested in our notice to produce

documents?

Would you do that?

A I don't have a lot of them and there is no purpose -- to see what?

Q To see whether there is anything in that book indicating that you had an appointment with anybody with respect to this case or any notation of a conversation?

A I can tell you I didn't.

Q You did not?

A It would be futile to look at it.

Q Why areyou so sureof that, sir?

A I have not had anybody to my knowledge that I have had in the office to discuss this case with.

Q Or out of the office?

A Or out of the office, outside of the telephone calls that I had from time to time, as I outlined to you.

Q And those would not be noted in your book?

A No.

Q Do you keep any record of your time spent on various matters in your office?

A We do not.

Q And so you would not have any record of the amount

of time you spent on this case; is that correct?

A Absolutely not. As of now we have not any way. We never had on cases.

Q Would it be fair to say that you have spent more time on this case than Mr. Intrater?

A Possibly, in reading more than he has about it.

Q From the correspondence it would appear that you have had more correspondence with people with respect to it.

A Right.

Q Is that a fair indication?

A I am a stockholder and I know a little something about stock and I am interested in this because this is my dollars involved in this.

Q Would you look at Defendant's Exhibit 12, please, which appears to be a letter dated, or a copy of a letter dated October 11, 1973, to Mr. Belkin. Looking at that, can you tell us whether you had any contact with the SEC between September 20, which is the date of the previous Exhibit and October 11, the date of this exhibit, either written or oral?

A None, except that I went down there and looked at some documents, I believe, between that time, or it could have been in that area, but I had no conversations with

anybody who actually worked for the SEC that I can recall.

Q Now, was this letter written by you or by Mr. Intrater, and before answering that question, I would like to direct your attention to the fact that the name Samuel Intrater appears at the bottom, but the initials A.B./I.M.S. appears at the lower left-hand corner.

A It is possible I could have dictated this letter.

Q Was Mr. Intrater back in the country by October 11, 1973?

A I don't recall; I have no idea.

Q This letter commences, "On September 20, 1973, I wrote you concerning the above case," and that reference is to Exhibit 11, the letter dated ---

A That is the letter I signed.

Q Does that help to refresh your recollection?

A No, it doesn't, but I am pretty sure I dicated this.

Q This letter continues, "Please let me hear at once. Otherw I will have to file a motion in the pending action to compel you to deliver this by way of subpoena served upon you. I am trying to avoid all this procedure, and as I pointed out in the letter, under the law in the District of Columbia and the United States we are

entitled to this information."

Is that another instance of your acting as an attorney in this case?

A Possibly, yes.

Q And you do hope to be compensated for your time in acting as an attorney ---

MR. INTRATER: Don't answer that.

MR. McINERNEY: Did you instruct the witness not to answer?

MR. INTRATER: Do you want to read back what I said?

(The record was read by the reporter.)

MR. McINERNEY: Would you mark this next document as Defendant's Exhibit 13.

(The document referred to was marked for identification as Defendant's Exhibit 13.)

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By Mr. McInerney:

Q Would you just identify that, Mr. Brick?

A This is a letter from Merton B. Goldman of the SEC to me, dated October 16, 1973.

Q The last or next to last paragraph of that letter points out that if you disagree with the staff's position in

refusing to give you the files you have requested you have a right to have it reviewed by the Commission, thatis the Securities and Exchange Commission. Did you in fact request that review?

A Not as yet.

Q Just to shorten this, Mr. Brick, apart from these letters and the conversation about which you have testified, have you had any other contacts with the SEC with respect to this matter?

A None whatsoever.

Q Now, sir, I show you a letter dated October 26, 1973, which I will ask the reporter to mark as Defendant's Exhibit 14.

(The document referred to was marked for identification as Defendant's Exhibit 14.)

XXXXXXXX

By Mr. McInerney:

Q Can you tell us what that is, please?

A That is a letter to Norman Dicks, who I met one night about, I think the day before I wrote this letter to him and discussed the case with him, and he told me to write him a letter and he would see what he could do about

getting this information for us. To shorten it up, I have never heard from him since, never even talked to him on the telephone.

Q What was the occasion of your meeting Mr. Dicks?

A He was out to supper with myself and a retired Captain in the Navy, George Seamore. He is a friend of Seamore's.

Q And this case just happened to come up in the course of the conversation?

A Yes. He is a young lawyer who works for Senator Magnuson and he suggested I write him. I had discussed it with him that the SEC had been refusing to give me this information.

Q Did you have any other contact with Mr. Dicks subsequent to the writing of this letter?

A I have just got through telling you I have never talked to him since I wrote the letter.

Q This letter enclosed copies of the exhibits that we have just been looking at dated September 20, 1973, and October 11, 1973, and it states that both of those were written by my partner, Samuel Intrater. That is not quite accurate?

22 A No, that isn't accurate.

Q Is there any particular reason for that? Is it just an inadvertence?

A No, it is just an inadvertence on my part.

Q Now, the last line on the page, "Please be free to call upon me and we will be glad to discuss this at great length with you." The "we", I take it, is Brick and Intrater?

A Yes, both of us.

(The documents referred to were marked for identification as Defendant's Exhibits 15-A through 15-E.)

XXXXXXXX

By Mr. McInerney:

Q In order to shorten this, Mr. Brick, I have asked the reporter to mark the next group of documents as one exhibit which is Exhibit 15-A, B, C, D and E.

A Right.

Q I believe that 15-A is a letter from you to the Gilbert Brothers, is that correct?

A Right.

Q Now, without going through all of these, would you

just describe this series of correspondence as to what your purpose was in writing them and what information you received as a result?

A I received no information. My purpose in writing was to get up there and talk to them. Maybe they knew something about this case. That was my purpose. I have never talked to them on the telephone or seen them, although I intended to at sometime when I am in New York at my leisure.

Q Now, have you looked at each of those documents and will you identify them?

A The letter of August 15 was to the Gilbert's. The letter of August 15 -- well, that was Exhibit 15-A. 15-B, August 15, is to Henry.

Q Both of those were actually sent by you?

A Absolutely.

Q And 15-C is the answer from Lewis D. Gilbert saying he was going on vacation, and 15-D is my answer from John C. Henry.

Q Both of those were actually received by you?

A Yes. And 15-E is my letter to Henry.

Q Now, apart from those letters, I believe you said you had no conversations with these gentlemen?

A Right.

Q Have you had any conversations or correspondence with anyone else with respect to this lawsuit other than the documents we have seen and the conversations which you have described in your deposition earlier today?

A None, except I may have received calls and sent pleadings to several law firms.

Q Would you tell us who they would be?

A I will be glad to furnish it to you but I don't remember it offhand.

Q How did those occasions arise?

A Well, they called the office and got me and said they had read about this suit and would I send them copies of pleadings, and that was the extent of any conversation I had with them.

Q And you did send the pleadings to them?

A Yes.

Q Did anything come of that?

A I saw that is the last I heard from them.

Q No acknowledgement?

A No acknowledgement.

Q How many such law firms?

A I think one was in Washington and one was in Chicago.

Q Would you tell us the substance of the conversations you had with the lawyers when they did request copies of the pleadings?

A I think theone in Washington just asked for it and the one in Illinois, I believe, did tell me on the telephone that they were considering and would like to see what points I covered in the pleadings.

Q They were considering what, sir?

A Maybe filing suit.

Q Did they tell you whom they were representing?

A No, I didn't ask them or anything.

Q In neither case did you ask or receive the information whom they were representing; is that correct?

A That is correct.

Q Were there any other contacts that you had with any other law firms?

A Not that I recall.

Q Do you recall any other contacts with anyone else in this case other than your partner, Mr. Intrater?

A No, I don't recall anybody else.

Q You read our notice to produce documents and searched for documents to respond to that; is that correct?

A Right.

Q Were any documents withheld from us on any claim of privilege?

A No, not that I know of.

MR. McINERNEY: Mr. Intrater?

MR. INTRATER: Do you want to go off the record again?

MR. McINERNEY: Yes.

(Discussion off the record.)

MR. INTRATER: On the record.

What I just said off the record was you are not taking my deposition. However, I will answer. We didn't claim privilege on anything, period.

By Mr. McInerney:

Q Mr. Brick, you brought this lawsuit and I am quoting from paragraph 3 of your complaint, "On behalf of himself," referring to you, Mr. Brick, "and others in the same or like or similar position or status in which plaintiff finds himself."

Now, that is an effort to describe a class, is it not?

A I didn't describe it as such, but I assume it is. You will have to find that out from Mr. Intrater.

Q I would like to know from you, sir, what the class is thatyou claim to represent?

A I don't represent any class. I hope to represent anybody who wants to join the action.

Q You don't represent any class?

A No, sir.

Q In other words this complaint speaks of a class action, that really is not intended?

A I don't know what the intention is going to be because if people want to join it later on after we file it, that is perfectly all right.

Q But the only people that you anticipate representing in this action are people who will come and join you as parties to it?

MR. INTRATER: This complaint is my handiwork. It really isn't proper for you to question him about this. The fact of the matter is it was my intention and is that this is to be a class action. It is to represent all the stockholders who are in the same position as Mr. Brick is in this position.

By Mr. McInerney:

Q Do you adopt that, Mr. Brick?

A Yes, I would adopt that.

28 Q In other words, you do claim to represent some other people who are not parties to this action?

A Well, if the court decides anybody who stands in the same position I stand in would be entitled to the same benefit, I guess you are correct inyour statement.

Q It is not a statement, sir. It is a question. I am trying to find out who those people are. How would you describe them?

A I would describe anybody who is a stockholder.

Q At any time particularly?

At any particular time, yes.

Q I mean are there no time boundaries to your statement?

A Oh, it is from the time that the stock was sold to the public.

Q You were not a stockholder at that time.

A I know it.

Q You became a stockholder, I believe you testified, in February.

A That is correct.

Q Of this year.

A That is correct.

Q So you do not claim to be in the same position as people who bought during the public offering, do you?

MR. INTRATER: That is a legal position and as the attorne I will say yes, he is. He is in the same position. He is in the same position as all the stockholders. They are in the same position he is in.

MR. McINERNEY: Regardless of when they bought that stock?

MR. INTRATER: That is correct.

By Mr. McInerney:

Q Was this a subject of discussion between you and Mr. Intrater, Mr. Brick?

A We discussed it.

Q And what did you discuss about it?

A I think that is confidential. Anything I tell my attorney is really confidential. I don't think I ought to answer it.

Q Is it confidential as to who it is that you claim to represent in this case?

MR. INTRATER: Not at all. We have already said he represents all the stockholders. Now, with regard to conversations I had with him, very frankly the conversations I had with him were with regard to legal research that I had

conducted in this case and on the basis of that legal research I came to the conclusion that he had a right to represent himself and all other stockholders regardless of the time they purchased the stock. That is my legal research and you have no right to inquire into what legal research I did and the conversations I had with regard to that.

By Mr. McInerney:

Q Mr. Brick, whose idea was it to bring this as a class action?

A I think it was Mr. Intrater's.

MR. McINERNEY: Would you mark as Defendant's Exhibit 16 this oversized piece of paper.

(The document referred to was marked for identification was Defendant's Exhibit 16.)

XXXXXXXX

By Mr. McInerney:

Q Would you tell us what that is?

A That is a statement from Loeb Rhoades.

Q And does that reflect your acquisition of Funk stock?

A 600 shares of Funk Seeds International, Inc.

Q Purchased when, sir?

31 A Sometime in February. This shows it as 3/7/73.

Q You think it was in February but the document indicates it was in March.

A I actually placed the order in February.

Q Do you still own that stock?

A Yes.

Q And is that your only acquisition or transaction in Funk stock?

A Correct.

Q So you have not suffered any loss on your purchase of that stock?

A Not as yet.

Q Well, how did you come to buy that stock?

A On the recommendation of Vern Jacob, who is a broker for Loeb Rhoades. He suggested I sell Phillips Petroleum and buy Funk Seeds.

Q Did he tell you why?

A Yes. He said that the seed companies were very much in vogue and he was afraid that Phillips Petroleum would go down.

Q Did he show you any documents in connection with your purchase of Funk?

A No. He called me from New York and he sent me some in-house statement which I threw away.

Q In-house statement you mean of Loeb Rhodes?

A Yes.

Q Can you give us some description of what that statement was?

A No, I have no idea.

Q How long was it?

A It was short. A page or two at most.

Q And approximately what would the date of that have been?

A Well, if you give me the other exhibits, the exhibit showing the date of the order ---

Q Is this the exhibit to which you refer?

A No. This is the same as this. Don't you have a stock order showing the date that I bought the stock?

Q I don't believe we have, sir.

A Well, if you don't have it. Anyway, before I bought the stock he talked to me on the telephone and sent that to me and then called me another time and I said, well, go ahead and do it.

A little short in-house statement as I recall.

33 Q Can you tell us approximately what the date of that would have been?

A It was probably a week or so before I bought it in February.

Q Is there any other way that you can identify that statement?

A No. I wouldn't know it if I saw it.

Q Do you remember what it said?

A No, I do not. It just talked about Funk Seeds and the fact that it was going to be a demand when hybrid corn and so forth. It praised the whose industry.

Q I am sorry. I didn't hear something there.

A Read it back.

(The record was read by the reporter.)

By Mr. McInerney:

Q It praised the whole industry. Is that what you said?

A Yes.

Q Can you recall anything else about that document?

A Nothing other than what I have just mentioned.

Q Did he send you any other documents with respect to Funk Seeds?

A Not until after I think I filed suit he got me a red herring or a prospectus.

Q And is that the only other document that you have seen from him?

A That is right. Well, he may have sent me documents in the meantime. In the meantime I have gotten some reports, the annual report, since I have been a stockholder, but he didn't send it to me. The only thing he sent to me after that was whatever squibs his house has. He is a fellow when you buy a stock from him, whatever he sees in the newspaper or whatever they put out, they will send you a piece of the literature.

(Discussion off the record.)

MR. McINERNEY: Back on the record.

By Mr. McInerney:

Q Mr. Jacob is in the New York Office of Loeb Rhoades; is that correct?

A Right.

Q Now, did you look at any other document in connection with your purchase of Funk Seeds stock, other than the one you have just described?

A Not before I bought it, no.

Q And did you have any conversations with anyone with respect tc it other than the conversation you have just described?

A Nothing but my conversations with Vern Jacob, and I don't recallhow many we had.

Q Do you recall anything else that was said in the course of those conversations?

A No, I do not.

Q Now, subsequent to the filing of your complaint, apart from the letters that we have seen and the conversations you have described, have you communicated with any other Funk stockholders?

A Some fellow called me up one day and told me that he was a Funk stockholder but that is the only one I think I have had contact with.

Q Do you remember his name?

A No, but I can furnish that. I think I may have it somewhere in some notes or something.

Q If you would, please. What would those notes consist of, sir?

A I just wrote his name down.

Q On a calendar pad or something like that?

36

A No. I think on a piece of paper in the files. Mr. Intrater has.

Q Approximately when was this conversation?

A I don't recall. It was after I filed suit. I have never heard from him since.

Q Did he say what prompted him to call?

A Well, I think there was an article in the Wall Street Journal that I filed suit that he had read and that is the reason he called.

Q And did you ask him to join with you in the suit?

A I don't believe I did.

Q Have you asked anyone else to join with you in your lawsuit?

A I told you, Mr. Desser.

Q That is the gentleman from Maryland?

A Yes.

Q Now, in your answer to our request for documents you sated in part, "It is true that at the proper time from my standpoint I will contact many companies, persons, people and groups, including any Funk or CPC director, officer, employee, representative, or shareholder."

37 What do you intend to say when you contact those people?

A I couldn't tell you now. I am just going to try to get the facts.

Q Do you have any specific people in mind or do you intend to contact ---

A I am going to contact anybody I think has any knowledge of this. I am certainly going to contact the associates. I am sure my partner is going to take depositions of the president of CPC and probably Funk and a lot of other people and I am going to personally, if I can get any leads that I can, that I can turn over to him to help this case.

Q What would the purpose be in contacting shareholders?

A Well, the purpose in contacting shareholders would be maybe they would want to join the suit and maybe they can give me information that they know about when they may have had contact with some of these associates who would divulge to them the facts that might help in this case.

Q Now, do you feel free to contact any Funk shareholders with respect to this case and solicit their participation in it?

A Not as such. I am not contacting them with the purpose of soliticing, but after they know I have got a suit

filed, if they want to join, they are welcome to do it. I am not going out and looking for it. Up to now, as I told you, the only two who talked to me were telephone calls that I got and the only one who suggested joining is Mr. Desser.

Q He suggested joining or you suggested?

A Well, I suggested to him when he told me that he had asked his attorneys to file suit on it and that I filed it before they did.

Q Do you feel that you sort of preempted the field by filing our own suit?

A Not necessarily. I don't see why others can't file suit if they want to, but I suppose unless there are suits that have been filed I don't know about, probably I have covered the ground. I don't know. You arein a better position to tell me. Have other suits been filed?

Q No, sir.

A Well, maybe I preempted it.

Q Now, this answer to our request for documents, which you signed and which has been marked as Defendant's Exhibit 4, I believe, states that "At the proper time from my standpoint I will contact ..." then skipping "any Funk or CPC" ... skipping again, 'shareholder." What did you mean

by that?

A Well, when I get the facts, when our discovery is through and so forth, I may write a letter to everyone of the stockholders, get the stockholders list -- I think I have a right to do that -- and tell them what I have come up with.

And I firmly intend to do that as the plaintiff in this case.

Q Do you know how many shareholders there are?

A No, but I would imagine they are in the thousands.

Q And you intend to contact all of them?

A I probably will by literature or something. Once I get all the facts firmly set in this case I certainly am going to contact them.

Q Was this conversation with the gentleman from Loeb Rhoades the first time you had ever heard about Funk Seeds?

A I think basically. I could have possibly heard of Funk Seeds because I do read a lot of literature.

Q But you do not specifically recall; is that correct?

A It didn't make an impact. If somebody said Funk Seeds, I would have known there was a company like that, but I didn't know anything about its real background or worth or anything.

40 Q Did you discuss your purchase of Funk stock with anyone else?

A No, I did not.

Q Now, your complaint also states that your action is brought on behalf of Funk Seeds; is that correct?

A Yes.

Q Is that what is commonly known as a derivitive action, Mr. Brick?

A You would have to ask Mr. Intrater but generally I would say probably yes.

Q What is the claim that you are asserting derivitively?

A Well, all these wrongs that were done to Funk Seeds.

Q Well, could you specify?

A Well, the dividend for one.

Q Anything else?

A Well, even the sale of the stock as I talk about -- you know, the way these associates faded out of the picture shortly after the public sale. I think that the monies that the Defendant in this case acquired out of that should really belong to Funk Seeds International.

Q You think that the monies that CPC obtained by selling its stock in Funk Seeds ---

41 A Should really be assets of Funk Seeds.

Q I will return to the dividend in a moment, but apart from the dividend is it your position that whatever CPC got on its sale of Funk's stock belongs to Funk?

A It should belong to Funk, absolutely.

Q Will you enlighten us as to why you say that?

A Well, the reason I say that is because of the fact that if it turns out that CPC International, Inc. violated any of the laws, I think the benefit that they have got should be turned over to Funk. That is my feeling about the whole thing.

Q Is that your complaint?

A No, but I say it is on behalf of Funk Seeds, and I feel that any damages should go to Funk Seeds.

Any damages that Funk Seeds can show against CPC through this suit they should benefit.

Q Do you think Funk was damaged by the sale of its stock?

A Greatly. Indirectly they weren't damaged as much as the stockholders, but the stockholders are entitled to have Funk Seeds with assets that are now under the control of CPC International.

42 Q Which assets are those?

A Well, what they got from the sale of the stock and the dividends.

Q Do you regard what CPC obtained on its sale of Funk stock an asset of Funk?

A It should be an asset of Funk for any damages that we are entitled to recover.

Q You keep using the word "damages". What damages do you refer to?

A Well, if they violated the law in the way they sold this stock to the public, the benefit of that should go to Funk Seeds. Any damages that the court should find against CPC, that judgment should be paid to Funk Seeds.

Q Are you able to specify the damages any more than what you have just said?

A No, I am not. That is going to be up to the court.

Q Now, prior to filing your complaint, did you make any demand on Funk Seeds International or its officers or directors that they bring an action against CPC?

A No, because I felt it was futile.

Q And since that time you have not done so either;

43 is that correct?

A No, I have not.

Q You mentioned previously associates. Tell us what you mean by that word, please.

A Well, when I ran into it they had a number of companies that were associated with Funk Seeds who would be given Funk Seeds and they would plant and develop it and so forth and sell it in a given area. Those were the companies that I refer to as associates. As a matter of fact, when I finally got the prospectus, that is what they called it in the prospectus.

Q You got that after filing your complaint?

A That is correct.

Q Now, you mentioned the termination of associates. What did you mean by that?

A Well, in the prospectus they claim that the contracts with associates ran from year to year, but the average one had been in effect 30 years, and yet it appeared that shortly after this stock was sold to the public the associates started pulling out and as the Forbes article indicates, it was possible that CPC and Funk knew before this stock was sold that thatmight have been a factor or they had such facts

that they should have disclosed to the public concerning that.

Q Well now, would you please try to specify when that happened? You said something ---

A Well, it appeared in the prospectus that they gave the people who bought the stock when they went public ---

Q I am sorry. I perhaps wasn't clear. When did this termination of associates occur?

A According to what I have read in the Wall Street Journal and the Forbes article it occurred within months, like six months or so after they went public.

Q You can't specify any better than that?

A No. When Mr. Intrater gets the discovery it will determine that, but I am just going on what I have read in Forbes and there was a Wall Street Journal article I read one time.

Q Did that happen before you acquired your stock in Funk?

A No, I don't believe it did. It could have and I couldn't have known about it, but I read about it subsequent to the time I acquired the stock in Funk.

Q Do you know why those terminations occurred?

A No, I do not. That is what we want to get on

discovery. Mr. Intrater is going to have to get that. I might say that some of these terminations could have taken place before I bought the stock but I didn't know it at the time.

Q Didn't the Forbes article refer to the termination?

A Yes, it did, absolutely. That is where I got it.

Q And do you recall that it stated in part, "During the closing months of 1972, the termination of contracts between seven franchise associated companies and Funk Seeds was announced"?

A I think it had it in there, but I didn't know it at the time I bought the stock.

Q Have you or Mr. Intrater been in touch with any of these associates or anyone representing them?

A I can only speak for myself. I have not been in touch with them.

Q Do you know whether Mr. Intrater has been?

A To my knowledge, he has not.

Q So far as you know neither you nor Mr. Intrater have had any contact with any of the associates whether they have terminated or not?

A That is correct.

46 Q Now, you have been in practice with Mr. Intrater for sometime and I think you have said that you have never previously acted in the capacity in which you now seek to act, that is, as a class representative or as a person bringing a derivitive action; is that correct?

A That is correct.

Q Do you know whether Mr. Intrater has ever done so?

MR. INTRATER: I object to that. Would you mind stating what legitimate purpose of inquiry there is to what kind of lawsuits I have filed in the past?

MR. McINERNEY: Of course it goes to your qualifications to represent the class you seek to represent.

MR. INTRATER: Don't answer that.

As far as my qualifications to represent anybody are concerned my reputation in this jurisdiction is established and I will put it up against your reputation anywhere that you practice law. I consider your inquiry as to my qualifications not only insulting but have absolutely nothing to do with this lawsuit.

MR. McINERNEY: I am not going to argue it at great length, Mr. Intrater, but I believe the law is that when you put

47 yourself forward as a champion of a large class the court has a right to know whether or not your are qualified to do so, and I am not questioning your competence as an attorney. I am simplying asking whether you have had any previous experience along these lines.

MR. INTRATER: If you want to make some sort of motion in court for my discharge as an attorney, go right ahead and do so.

MR. McINERNEY: Off the record.

(Discussion off the record.)

MR. McINERNEY: We have no further questions at this time.

MR. INTRATER: I have just a few.

XXXXXXXXX CROSS-EXAMINATION

By Mr. Intrater:

Q I show you Defendant's Exhibit No. 6, which is Plaintiff's motion to produce, directed to the Defendant. Isn't it a factthat from the commencement of the action up until the time that I went away on vacation I discussed with you the necessity of getting information and documents from the Defendant?

MR. McINERNEY: I object.

THE WITNESS: Absolutely.

MR. McINERNEY: You answered before I could object, Mr. Brick, but I am going to object to your counsel making statements and then asking you to affirm them. I think since you are partners in the same law firm there is absolutely no justification for that.

MR. INTRATER: You can answer the question.

THE WITNESS: I have answered it.

By Mr. Intrater:

Q And isn't it a fact that prior to going away I discussed in considerable detail most of the items that I would want them to produce?

A Absolutely.

MR. McINERNEY: I have the same objection.

By Mr. Intrater:

Q Now, with regard to Exhibit No. 7, I show you this letter to Mr. Walker, President of Funk Seeds International, dated October 11, and identified as Exhibit No. 7.

Do you recall my telling you prior to writing this letter that I felt we could probably get more information from him if you wrote as a stockholder than if I wrote as an attorney?

49

MR. McINERNEY: Same objection.

THE WITNESS: I do recall that.

By Mr. Intrater:

Q And wasn't that the reason that you wrote this letter rather than I writing the letter?

A Right.

Q Now, with regard to Exhibit No. 9, this is a letter to Mr. Forbes concerning a possible discussion of the facts in this case and with his employees.

Would you describe for the record what is the normal practice of our firm with regard to whether we investigate factual things or whether we have clients provide the factual information for us.

A Most of the time we have the clients do it. It is seldom that we do it ourselves.

Q And is that because of the size of our firm?

A Absolutely.

Q And isn't that the normal and customary practice, that our clients are the ones that dig up the information and present it to us?

A Yes.

MR. McINERNEY: I would like to note a continuing objection to all of this.

By Mr. Intrater:

Q Now, with regard to Exhibit No. 11, the letter to Mr. Belkin, I would like to show you this letter and ask you to look at it real quickly.

A Yes.

Q Do you recall who it was that actually found through legal research and read the case of Shapiro versus SEC cited in that letter?

A You did. You told me to include it in the letter.

Q And in fact hadn't we previously had a conversation in which you asked me whether or not we had a right to get this information from the SEC?

A We sure did.

Q And as a result of that conversation I went out and did the legal research?

A That is correct.

Q Isn't it true when I came in and gave you the legal research I told you what I wanted you to say to Mr. Belkin in your letter to him?

A That is correct.

Q And in fact the statements and items contained in this letter, aren't they in fact things that I told you to tell Mr. Belkin?

51 A That is correct.

MR. McINERNEY: I don't want to keep interrupting you, Mr. Intrater. I simply note the same objection to all of your cross-examination so far.

Cross-examination should be in quotes, Ms. Reporter.

MR. INTRATER: I won't answer that. If you just want to get nasty with me you can do that, too.

By Mr. Intrater.

Q Now, you were questioned on direct examination as to whether it was my idea to bring this as a class action. In fact, isn't what happened when you told me about this whole ting we disc sed it and that I did legal research and you questioned me thereafter as to whether I felt a class action was proper and I told you that I did?

Isn't that what happened in this case?

A That is correct.

Q And as a result of that I prepared the complaint in this case?

A That is correct.

MR. McINERNEY: Same objection. This is not cross-examination but a statement by counsel.

MR. INTRATER: I have no further questions.

52 REDIRECT EXAMINATION

XXXXXXXXXX By Mr. McInerney:

Q Referring to Exhibit No. 6 that Mr. Intrater showed you, your demand to produce documents, that I believe you testified previously you drafted, would you give us the substance of the conversation that you and Mr. Intrater had with respect to what kinds of documents you had asked to be produced?

A Well, I don't recall exactly, but all during the time when we were talking about it we were anxious to get to this point and he would tell me what he thought we ought to ask for.

Q Would you identify any portion of the documentary demand that was suggested by Mr. Intrater?

A Offhand I can't because I don't recall. I am sure that No. 7 was completely his idea.

Q Anything else that you can now recall?

A Specifically right now that is about the only one that I can recall specifically. And I think No. 10, because anything that dealt with the dividends, he had discussed that with me at great length before we ever did this, so anything that deals with the $13,500,000 actually

53 comes from Mr. Intrater.

He had quite a few questions on that.

Q Can you identify any others, other than 6 and 10?

A Let's see, 6, 10, there is 12, 14.

Q Are you telling us that each of those were suggested by Mr. Intrater?

A Well, in substance, yes.

Q What do you mean by that?

A Well, he told me that when we asked for this to make sure that we had a lot of information, a lot of questions, a lot of information. We wanted a lot of information on the loan of $13,500,000 from the Chemical Bank.

Q Was there a prior draft of this document, Defendant's Exhibit 6?

A No.

Q And this document was created by you while Mr. Intrater was out of the country?

A That is correct.

Q Is it normal practice in your office to have your clients draft notices to produce documents?

A No.

Q Isn't it normal for you to have them write to

54 attorneys such as Mr. King of the Chicago law firm?

A No, except in this particular case I am a stockholder andI am in the firm and I am an attorney, and I think I am competent enough to speak to them and he thought that since I was a stockholder, even though the fact I am an attorney, I was the one who should have written that letter.

Q Do you normally have your clients write to the SEC and to the Magnuson Committee?

A No. Once in a while we do have them write to their Congressman or agency, but again, I am not only the litigant, I am the Plaintiff, and the fact that I am an attorney makes it more proper that I write it. If it is all right for a stockholder to write, I am writing as a stockholder as well as an attorney.

Q Now, approximately how many hours have you spent on this case to date?

A I probably have spent maybe five or six days in time.

Q And how many days has Mr. Intrater spent or how many hours?

A I couldn't tell you.

MR. INTRATER: Don't answer that. That is none of his

55 business.

By Mr. McInerney:

Q How do you expect to be compensated for the time you are spending on this case?

A Well, as I said before, if the court doesn't allow me a fee, that is just the way it is. I expect to be compensated because if Funk Seeds Company can recover some of this money, thatis now being wrongfully held by the Defendant in this case, it will increase the assets of Funk Company and my stock will go up and I will at least be able to get my money and maybe a profit out of it, because if this $13,500,000 was an improper dividend and it is decreed that it really belongs to Funk Seeds, by my reasoning, whether it is right or wrong, I think there is approximately three million shares out, a little less than that, that would add four or five dollars of assets to Funk Seeds, and if I am right about the rest of it, it would increase the liquid assets of Funk Seeds by as much as the recovery would allow it.

And I expect that will be of benefit not only to me but other stockholders who sit in the same boots that I am in.

Q Do you expect, in addition to any increase that may come about in your 600 shares of Funk Seeds, any additional reward?

56 A No, I do not. Except as I told you before, if the court should allow me a fee. It is up to the court 100 percent. I firmly don't believe they will, but they could, and I am not saying that I would turn it down if the court allowed it.

Q Isn't it your intention to have a fee application in this case?

A It is not my intention at the present time but I can't commit myself to the future.

Q Well, if Brick and Intrater is awarded the fee, you will share?

MR. INTRATER: Brick and Intrater is not the attorney in the case. The attorney is Sam Intrater.

By Mr. McInerney:

Q Referring back to the document you drafted, Mr. Brick, which we have identified as Defendant's Exhibit 6, it calls on the Defendant to produce certain documents, "At the offices of Brick and Intrater"; is that correct?

A That is correct.

Q Where else would they? That is the office. The office is not owned by Samuel Intrater as such. It is a partnership, Brick and Intrater, if you want to get technical.

57 Q Do you and Mr. Intrater have any written partnership agreement?

A No, we don't.

MR. INTRATER: Don't answer that.

By Mr. McInerney:

Q Do you have any understanding as to sharing in any benefits that may accure to either of you with respect to practicing law?

MR. INTRATER: Don't answer that question. He has no right to pry into our partnership and our relationship together. I am just astounded.

By Mr. Mc nerney:

Q Do either of you earn any fees from practicing law in which the other does not share?

MR. INTRATER: Don't answer that.

MR. McINERNEY: No further questions at this time.

(Whereupon, at 1:15 p.m. the deposition was concluded.)

- - - - -

I have read the foregoing pages 2 through 109, inclusive, which contain a correct transcript of the answers made by me to the questions therein recorded.

_____

58 CERTIFICATE OF NOTARY PUBLIC

I, Doris Burns, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in shorthand to the best of my ability and thereafter reduced to typewriting under my direction, that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, or employed by any of the parties to the action in which this deposition was taken; and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

_____

Notary Public in and for
the District of Columbia

My Commission expires

Brow

43923

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERT BRICK,

Plaintiff,

-against-

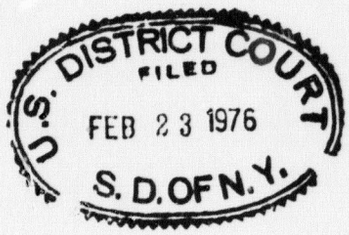
CPC INTERNATIONAL INC.,

Defendant.

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74 Civ. 4938-LFM

MEMORANDUM



MacMAHON, District Judge.

Plaintiff moves for class action certification, pursuant to Rule 23, Fed.R.Civ.P. Defendant opposes the motion primarily on the ground that plaintiff will not fairly and adequately protect the interests of the class.

The amended complaint contains three counts charging defendant with fraud and negligence in the sale of securities. Plaintiff alleges that defendant, who was sole owner of Funk Seeds International, Inc., made a public offering of the Funk Seeds stock in the summer of 1972; that at the time of the offering defendant knew

that several companies who had major contracts with Funk Seeds intended to terminate those agreements; that cancellation of those contracts would probably result in severe losses to Funk Seeds and involve extensive litigation; and that these facts were not disclosed by defendant in the prospectus issued at the time of the offering.

Plaintiff purports to bring this action on behalf of all persons who bought stock after the 1972 offering. Plaintiff purchased his shares in February 1973, after most of the Funk Seeds contract terminations had occurred. The "inspiration" for and information necessary to bring this suit was supplied by an article in the August 1, 1973 issue of Forbes magazine. Plaintiff is a lawyer and member of a two-man firm, Brick and Intrater. His partner is counsel for the putative class. 1

Designation as a class representative places one in a position of public trust, and courts must make that determination only after intense scrutiny as to whether the plaintiff's attorney is qualified, experienced and has no interests antagonistic to the class. 2

The court must also protect against the public apprehension that the class action device encourages strike suits and excessive attorney's fees.[3]

Although an attorney in a class action suit often has a financial interest in conflict with those of the class members, the danger of strike suits and the appearance of impropriety is worse when the attorney is allied with the party who brought the suit. For this reason, when a plaintiff is likely to share in the award of attorney's fees because of close association with his lawyer, class certification has been denied.[4] Especially in this case, where there is a substantial question of plaintiff's reliance, the impropriety of plaintiff taking the stand while his partner is a lawyer in the suit is an additional reason why certification should be denied.[5] Moreover, to the extent we must assess counsel's ability and diligence to prosecute the suit as a class action, we note that plaintiff has not supplied this court with any factual or legal argument in support of his motion.

Accordingly, plaintiff's motion for class certification is denied in all respects.

So ordered.

Dated: New York, N. Y.
February 23, 1976

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge

Brick v. CPC International Inc. 74 Civ. 4938-LFM

FOOTNOTES

1 Deposition of Albert Brick (December 14, 1973), pp. 17-18, 54-58.

2 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968). 68 FRD 58 59

3 Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1050 (2d Cir. 1973).

4 In re Hotel Telephone Charges, 500 F.2d 86, 91 (9th Cir. 1974); Holland v. Goodyear Tire & Rubber Co., 1975-2 Trade Cas. ¶ 60,522 (N.D. Ohio 1975); Stull v. Pool, 63 F.R.D. 702 (S.D.N.Y. 1974); Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7 (D.D.C. 1973); Cotchett v. Avis Rent A Car Sys., Inc. 56 F.R.D. 549 (S.D.N.Y. 1972); Shields v. First Nat'l Bank of Arizona, 56 F.R.D. 442 (D. Ariz. 1972). see 521 F2d 615 68 FRD 53

5 Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972).

Superior Court
of the District of Columbia
Washington, D. C. 20001

Harold H. Greene
Chief Judge

April 5, 1976

United States District Court
for the Southern District of New York
United States Courthouse
New York, New York 10007

Gentlemen:

I have known Samuel Intrater for over twenty years. During that time, he has been an active trial attorney, having tried hundreds of cases. He enjoys an excellent reputation in the legal community. I can personally vouch for his ability and integrity. I am sure that he would be competent to try any type of law suit.

Sincerely,

Harold H. Greene

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALBERT BRICK,

Plaintiff-Appellant

v.

CPC INTERNATIONAL, INC.,

Defendant-Appellee

No. 76-4143

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the Appellant's Brief & Appendix (2 Vols.) in the above-entitled case, on the following counsel of record, this 21 day of May 1976.

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Subscribed and Sworn to before me this